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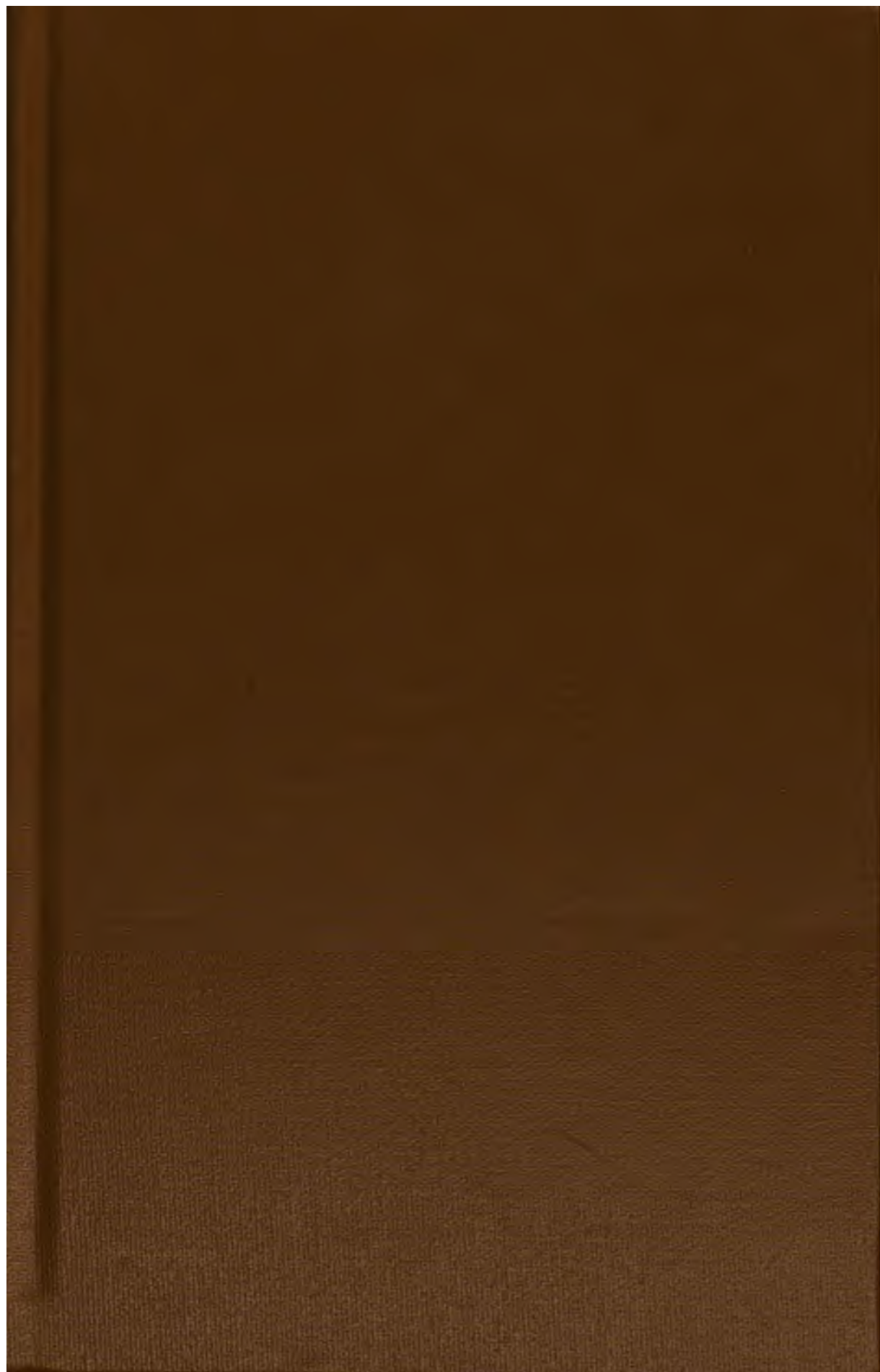
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A
TREATISE
ON
THE AMERICAN LAW
OF
LANDLORD AND TENANT;

EMBRACING

THE STATUTORY PROVISIONS AND JUDICIAL DECISIONS OF THE
SEVERAL UNITED STATES IN REFERENCE THERETO;
WITH A SELECTION OF PRECEDENTS.

FIFTH EDITION.
REVISED AND ENLARGED.

By JOHN N. TAYLOR,
COUNSELLOR AT LAW.

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LITTLE, BROWN, AND COMPANY.
1869.

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JOHN N. TAYLOR,
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of New York.

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CAMBRIDGE:
PRESS OF JOHN WILSON AND SON.

THIS FIFTH EDITION
OF THE
LAW OF LANDLORD AND TENANT
IS RESPECTFULLY DEDICATED
TO
THAT HONORABLE PROFESSION,
FOR WHOSE USE IT IS PRINCIPALLY DESIGNED, AND WHOSE GENEROUS
APPROVAL HAS ANIMATED AND REWARDED THE LABOR
OF
THE AUTHOR.

P R E F A C E

TO

THE FIFTH EDITION.

IN the preparation of this edition, every part of the work has been thoroughly revised, and several important additions made. Some alterations were rendered necessary by reason of changes in the current of modern authorities, and some conflicting adjudications have either been harmonized, or the differences briefly stated; but the original plan is not essentially changed. Such cases as have been reported since the publication of a former edition, were carefully examined, and, so far as they were found tributary to the general design, are freely incorporated; but the work has not been burdened by the citation of cases which merely recognize principles previously well established. More than a thousand additional cases are embodied which exhibit distinct modifications of the law as it previously stood, or present further developments of its leading principles. Some portions of local or statutory law have been transferred from the text to the notes, or made applicable to the general law of the States, by the addition of explanatory notes; as in the chapter on summary proceedings to recover possession, where, besides the form of procedure in the State of New York, a full note is appended setting

forth in detail the leading features of similar process in other States. A large amount of new matter is thus presented, but in so condensed a form that the size of the volume is not materially increased. Great care has also been taken to correct former inaccuracies, by diligently collating the text with the original reports, and minutely verifying the citation of cases. In this task the author has availed himself of the very valuable assistance of Mr. Joseph Willard, of the Boston bar, who has given much attention to the law of real estate, and thereby rendered himself particularly well qualified to perform this service. Under these circumstances, the work is again submitted to the profession, with more confidence in its utility, than at any former period.

BROOKLYN, N.Y., October, 1869.

P R E F A C E
TO
THE FOURTH EDITION.

IN this edition, the work has been again revised and corrected, and some additions made to the text. Very little, if any alteration will be found in the original plan of treating the rights of the parties, or their remedies. Although Codes of Procedure have, since our first publication, blended, and in many respects simplified, forms of action, yet the common-law divisions at first adopted seem best calculated to elucidate the general principles of pleading and of practice; while they continue to form the basis of much legislation, that is not yet repealed in the United States. The articles relating to summary proceedings on the part of the landlord to recover possession of his premises, as well as to that of a forcible entry and detainer, have been re-written and considerably enlarged; and a full set of precedents of proceedings, in each case, has been added. A large addition of notes embraces many important decisions which have been made since the last edition, and may, to some extent at least, render the work more worthy of the very liberal favor with which it has been received.

BROOKLYN, N.Y., January, 1866.

P R E F A C E

TO

THE FIRST EDITION.

THE following attempt to reduce the Law of Landlord and Tenant to a more than ordinarily concise and systematic form will, it is hoped, meet with the indulgence of the profession for whose use it is principally designed. The learned and voluminous works of Woodfall, Chambers, Comyn, and Platt, are, to a considerable extent, useless in this country; not from any want of accuracy, fulness, or perspicuity, but from their failing to exhibit a correct view of this branch of law, as modified by our republican institutions, and reformed by the commercial spirit of our age. An exposition of the law on this side of the Atlantic, on a subject of such daily and hourly interest, which shall exhibit the various relations of the parties to a tenancy as understood among us, unencumbered by the useless learning of the English treatises, has, therefore, become a matter of importance, not only to the profession, but to the entire community.

This work does not aspire to the merit of having achieved so desirable an object, but is merely intended to present a practical summary of the doctrines of the common law, — including the English cases, so far as they are applicable

in the United States, — with their statutory alterations and modifications, and the leading decisions in those States where legal science has been most cultivated and improved.

Some topics have been introduced, which are not usually discussed in treatises on this subject, but are still intimately connected with it, and must therefore be found useful to the practitioner. Beginning with the several modes of creating a tenancy, its varieties, commencement, and termination, the work proceeds to treat of the formal parts of the instrument of demise, its execution, and the capacity of the various contracting parties thereto ; explains the rights and liabilities generally incident to the relation of landlord and tenant, embracing the subjects of division-fences and party-walls, of mutual liabilities for negligence, of nuisances and easements, with rights of way, commons, fisheries, watercourses, removal of buildings, and support from neighboring soil and buildings. It then examines the special covenants and conditions which the parties usually employ, for the purpose of limiting and defining their respective rights and duties ; the consequences of an assignment of the lease, as well as of the reversion ; the several modes of dissolving a tenancy, and the consequences of a dissolution, including the penalty of holding over, the right to emblements, and the removal of fixtures ; together with the legal remedies open to either party, and a selection of the most approved precedents of leases and forms of proceeding.

If, in the execution of the design, some topics have been omitted, or others not so fully discussed as, in the opinion of some persons the subject would seem to warrant, it is to be borne in mind that the admission of every thing connected incidentally, as well as directly, with the relation of

landlord and tenant, would have increased the work to an extent inconsistent with the original object.

That object was to furnish a compendium, which should not only be useful to the profession in the ordinary routine of business, but of easy reference to every member of the two great classes of society whose rights and duties are the subject of inquiry. The Author will feel satisfied, if, in this attempt to abridge the labors of an arduous profession, he shall, in any tolerable degree, have succeeded in exhibiting so accurate and concise an exposition of his subject as will be useful to practical men, whether in or out of the profession.

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THE LAW
OF
LANDLORD AND TENANT.

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INTRODUCTION.

§ 1. THE relative position of a civil government to its citizens — that of protection on the one hand, and of dependence on the other — necessarily involves the idea of allegiance and service to the State, as a condition to the use and enjoyment of the land within its boundaries. Hence some mode of tenure is incident to every government; and the highest estate which a man can have in land has direct reference to his duty to the State, being called a tenancy in fee-simple; while the occupant is a tenant in fee, and is said to have and to hold his lands, to him and to his heirs. He holds of the State to which he owes fealty and service; and, if he fails in his allegiance to her, or dies without heirs upon whom this duty may devolve, the tenure is at an end, his land returns to the common stock from which he had it, and vests again in the Prince, or other representative of State sovereignty, whoever it may be; who is thence called, in common-law language, the lord paramount.

§ 2. This tenure necessarily gives rise to another legal relation, which springs up between the original tenants to the State and the various individuals among whom they find it convenient or necessary to divide their possessions, for purposes of cultivation or improvement. And this relation is necessarily modified in its character by the peculiar structure of the government under which it subsists. History teaches, that all municipal law is, in fact, but a reflection of the policy and manners of the age from which it

sprung; while the history of our law exhibits the feudal institutions of our Norman ancestors extensively incorporated throughout the whole body of modern jurisprudence, but most intimately with that portion of it which forms the subject of this Essay. It will, consequently, be found difficult, if not impossible, to form correct ideas of this particular mode of tenancy, and of the various changes through which the relation of landlord and tenant has passed, from the barbarism of ancient Europe, to the humanity and refinement of free America, without some previous knowledge of the history and character of the feudal ages, in which it was matured, if it did not originate.

§ 3. By the theory of the English law, upon which our legislation on this subject is essentially based, all property in land, since the Norman Conquest, is derived from the Crown. The King, after that event, portioned it out in large districts to the prominent men who surrounded him, and who had been useful to him in war, and were capable of advising him in peace. These again subdivided their districts among their immediate followers and dependents, the actual occupants and cultivators of the soil. To all such grants, however, an express reservation of military service was annexed; each of the principal feudatories becoming, in turn, the head of a military power, always liable to be called into action, and ever ready to defend his chief. As a compensation for this service, the vassal was entitled to the use of the soil, the fee remaining in the lord; but he was regarded rather as a bailiff or servant, accountable for the profits of, than as having any direct property in, the land. His tenure, or fief, as it was called, was of the most precarious kind, depending entirely on the pleasure of his lord, and afforded little if any encouragement to the improvement and cultivation of the land.¹

¹ The Norman period is assumed in the text, for the purpose of exhibiting the doctrine of tenures; but there is no reason for thinking that the material parts of the feudal tenure, as exercised by the Normans, did not exist in England before their arrival. A large portion of the lands entered in the Conqueror's celebrated Domesday-book, are stated to be held by the same tenure, at the same rent, and subject to the same services, as they were in the time of Edward the Confessor; and the internal evidence of Domesday bears no reference to any simultaneous surrender of former tenures, and re-grant

of the same lands as feudal. The Normans probably introduced some new provisions into existing tenures, and attempted more; and we know there was a contest between them and the English, whether many of those laws which had been neglected for a time should be restored or not. But the fact of their having been restored will serve to show that no great change was ultimately allowed to prevail; and that the general system of the laws continued much the same under the new dynasty as it had been under that of the Saxons, with the exception of such usurpations as were from time to

§ 4. It soon, however, appeared to be so manifestly just, that one who had sowed and cultivated the land, should be allowed to reap the crop, that fiefs, which were at first so precarious, presently became annual. Having advanced to this degree of permanence, they were next granted during a term of years, in favor of men who had employed their means and labor in building, planting, and improving, and who would have no inducement to do so, unless they were permitted to enjoy the fruits of their labors, for a reasonable period. Then, as it would be hard to deprive a man of his possessions, who had always done his duty, and performed the conditions on which he received them, chieftains soon began to consider themselves entitled to demand the enjoyment of their lands for life. Finally, it was found that a man would more willingly expose himself in battle, and devote himself more unreservedly to his lord's service, if assured that his family should inherit his possessions, and not be left in poverty by his death; whereupon fiefs became hereditary.¹

§ 5. But, although a certain degree of stability thus began to attach to these tenures, they were burdened with the most onerous incidents. No man could dispose of his lands, either by sale or by will, for ever so short a period, without the consent of his superior. The possessor was not the proprietor, but the mere beneficiary, and could not oblige his superior to accept of any vassal or occupant that was not agreeable to him. Hence arose fines for alienations, escheats, reliefs, wardships, and primer seisins.² Women were obliged to marry the nominee of the lord or forfeit their lands, and frequently paid large sums for the privilege of making their own choice in marriage. Justice itself was openly bought and sold; and the King's court, the highest judicature in the kingdom, was, under this detestable policy, open to none but those who brought presents. The miserable vassal was in fact, as well as in name, his lord's man. Surrendering to him his intelligence with his independence, his whole life was spent in a laborious and degraded

time forced upon the English. Spel. Gloss., 219; M. & S. Hist. of Boroughs, 69; Hale's Hist. Com. Law, 120. See also Co. Lit., 64 a, note; 2 Bl. Com. 48; Reeves's Hist. Eng. Law, vol. 1, p. 8; Gilb. on Ten. 80; Bacon on Leases, 1.

¹ Whatever uncertainty there may be as to the time when feudal tenures were first introduced into England, there seems to be none that terms for years were of

common occurrence prior to the reign of Edward the First, as the statute of 6 Edw. I. c. 11, refers to a letting for a term of years, apparently as an ordinary event.

² Fines upon alienations, are in modern times known as bonuses or gratuities, which the owner receives as the consideration of granting his permission to the transfer of a lease.

vassalage upon the soil, where he received protection and from which he derived subsistence. The tenure by which he held was *feudal*; and the whole policy of the system, — which originated, in all probability, with the Gothic conquerors of the Roman Empire, — essentially warlike, though servile in its character, was well calculated to defend by arms that which had been obtained by force. The feudal system remained in operation during the time that the laws and institutions of England were in the process of formation, and necessarily gave character to them: and although it was essentially abolished during the reign of Charles the Second, when it came to be considered as destructive of the public peace, and opposed to the progress of society;¹ yet the traces of its policy are still distinctly visible on both sides of the Atlantic, much of its technical language is retained, and many of its arbitrary rules yet exist.²

§ 6. We have seen that a leading characteristic of feudal tenures had been, that the vassal took the profits, while the property of the soil remained in the lord; the lord's seignior, together with the vassal's feud, made up the whole estate. But, by a series of legis-

¹ The military tenure of land had been originally created as a means of national defence; but, in the course of ages, whatever was useful in the institution had disappeared, and nothing was left but ceremonies and grievances. A landed proprietor, who held an estate under the crown by knight service, — and it was thus that most of the soil of England was held, — had to pay a large fine on coming to his property. He could not alienate an acre without purchasing a license. When he died, if his domains descended to an infant, the sovereign was guardian, and was not only entitled to great part of the rents during the minority, but could require the ward, under heavy penalties, to marry any person of suitable rank. The chief bait which attracted a needy sycophant to the court, was the hope of obtaining, as the reward of servility and flattery, a royal letter to an heiress. These abuses had perished with the monarchy (of Charles I.). That they should not revive with that of Charles II. was the wish of every landed gentleman in the kingdom. They were therefore solemnly abolished by statute (at his restoration): and no relic of the ancient tenures in chivalry was suffered to remain, except those honorary services which are still, at a coronation, rendered to the person of the sovereign by some lords of manors. — Macaulay's England, vol. i. 144.

² The restraints upon alienation, mentioned in the text, being of feudal origin, were predicated upon that provision of feudal law which prohibited the lord from alienating his property to such an extent as to lose the ultimate control over it. Hence, at common law, restraints upon the alienation of lands in fee could only be imposed by persons having a reversion, or at least a possibility of reversion, in them. Chancellor Kent (3 Com. 506) gives an outline of the various causes which gradually led to the mitigation of these severe restrictions, until they were finally removed (except as to the King's tenants *in capite*) by the statute of *quia emptores terrarum*. In the State of New York, the Acts of Oct. 22. 1779, transferring the seignior of all lands, escheats, &c., from the King to the people of this State, and the Act of Feb. 20, 1787, putting an end to all feudal tenures, and substituting a tenure between each landholder and the people in their sovereign capacity, removed the entire foundation on which the right of the grantor to restrain alienation, in any shape, had formerly rested. The subject is very ably discussed in the arguments of counsel and of the learned judge (Ruggles) who delivered the opinion of the court in the case of *De Peyster v. Michael*, 6 N. Y. 467.

lative enactments, forced from the hand of unwilling power by the gradual advance of intelligence, and the resistless demands of the money-king, *Commerce*, these separate properties were at length blended into one estate; and the period finally arrived when the true proprietor held his lands of no superior lord to whom he owed homage, fealty, or other arbitrary service. He now had the entire right and dominion over the estate, and, subject only to the right of eminent domain, which the State never relinquishes, might alienate his land in any way and for any period he thought proper. His land was no longer trammelled by feudalism, nor locked up from commerce, but he possessed that free and full control over it which has been found so useful and necessary in the business of life, and thence enjoyed an estate called *allodial*.¹

§ 7. There had been an intermediate species of feudal tenure, called a *socage* tenure; but its incidents, although more definite and certain, were scarcely less rigorous and obnoxious than the arbitrary and uncertain tenure by knight-service. The term itself was applicable to freehold tenures of the Crown, and to all others, which were not military tenures, but were always deemed to be of an inferior and servile character. As intelligence, however, increased, society advanced; commerce began to flourish, and military services became less requisite; while agricultural productions were more in demand, and the lord soon found his interest in commuting the one for the other. The substitution of a certain service, or the rendition of a stipulated sum, in place of all uncertain and arbitrary, and therefore tyrannical, servitude, was a decided step taken towards the establishment of that freedom which the people were soon to enjoy. Still, however, the principal difference between these several species of tenure for a long time continued to be, that the services and incidents of the latter were of a fixed and certain character; while the former enjoyed not even this poor privilege.

§ 8. The remote and isolated position of the United States preserved, to a great extent, their independence of these embarrassing tenures; and, with a slight exception, their present condition includes no tenure but that which we have said is incident to every free government.² The law of nations has always acknowl-

¹ From *a*, privative, and *lode* or *leude*, a superior, is held in *allodium*. 2 Bl. Com. 104; 9 Cow. 437.
² The principles of English liberty were strong in the bosoms of our ances-

edged the right of a nation to acquire property, and sovereignty, over any uninhabited country which it discovers without a previous owner, if it proceeds to occupy and settle the country so discovered within a reasonable time. But the question has been left unsettled, whether a nation may lawfully take possession of a country where there are none but wandering tribes, whose scanty population is incapable of occupying the whole. It is admitted, however, to be lawful to confine such tribes within fixed limits, whenever it becomes necessary to make use of the land of which they stand in no particular need, and of which they make no actual and constant use. The discovery of America, consequently, conferred upon the government by whose authority such discovery was made, the ultimate dominion of the soil, with the right of granting title thereto, subject to the Indian right of occupancy.¹ The original settlers of this country invariably respected this right; and although some of the royal patents authorized them to take possession of and colonize their chartered domains, yet, following the example of the New-England Puritans, the colonists generally, if not uniformly, recognized the Indian title, and, from time to time, acquired by fair purchase such lands only as the Indians were willing to sell.² The General Government has acted upon the same humane principle; and the Indian title has, by this mode, become nearly extinguished throughout the wide expanse of our national domain.

§ 9. The ownership of land throughout the States is now essentially free and independent; but in the State of New York, previous to the year 1787, a considerable portion of land was held in free and common socage, under grants from the British Crown expressly creating such a tenure. During that year, the Legislature abolished military tenures, and all their incidents, from the 30th

tors, when they fled from feudal oppression, and founded on this western shore a government of equal laws, and of equal rights. They steadily opposed the introduction of any of the laws or institutions of the mother country which were not in conformity to these principles, or which in any respect violated the rights of the original owners of the soil. As to a tenure of land among the savages, there was none; no individual cultivated land for his own benefit, nor claimed protection in its enjoyment. It was only when civil government was established, and they were subjected to its sway that it became necessary to define the tenure by which they, as well as all other settlers upon the

lands of the State, should be thenceforth held.

¹ *Worcester v. The State of Georgia*, 6 Pet. 515; *Johnson v. McIntosh*. 8 Wheat. 548.

² Vattel, book 1, chap. 18, says, "We cannot help praising the moderation of the English Puritans, who first settled in New England" (and he might have added of the first settlers in all the other colonies); "who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the lands they resolved to cultivate." The United States Government continue the practice to this day.

August, 1664, when the province was surrendered by the Dutch to the English. It also abolished all tenure in socage, *in capite*, with all its fruits and consequences; and converted all manorial and other tenures into free and common socage. It reserved only the rents and services due to tenure in free and common socage from the persons previously entitled to them, together with the right of distress, as incident thereto. But the Revised Statutes of that State, in 1830, went the entire length of abolishing the existing theory of socage tenures of every description, with all their incidents, and declared that all lands within the State should be, thenceforth, held upon a uniform allodial tenure, vesting the entire and absolute property in the owners, according to their respective estates. At the same time, they provided that no rents, or services certain, which had been at any time previous, or might thereafter be created or reserved, should be thereby taken away or discharged. This statutory provision has now, by the adoption of the Constitution of 1846, become a fundamental law of the State.

§ 10. Allodial estates have, in fact, no mark or incident of tenure attached to them, being enjoyed in absolute right; while the term *tenure*, employed by the statute, implies the holding of some superior, and a subjection to an ultimate dominion, which we have seen, is abolished, except so far as is necessarily implied in the duty of allegiance to the State, but it is used in the statute in a popular sense for right or title, retaining the phraseology of English law without its signification, and serves to show how tenacious a grasp the feudal principle has had on the public mind and policy, that its language must still be retained, although the thing itself has ceased to exist in any shape.

§ 11. If any feudal fiction or service can yet be supposed to remain in any part of the United States, it is believed to consist solely in the principle that lands may be held of a person to whom the payment of a determinate rent, or certain service instead of rent, is due, as to a lord paramount. But this wants the essential characteristic of a feud, since it exists only by virtue of an express and voluntary contract between the parties, and, if retained at all, in any sense, received a most important modification by the Revolution of 1776, which transferred the domain, with the sovereignty of Great Britain, to the people of the United States. So that fidelity to the State is now the only fealty that any man owes for his lands; his only lord paramount is the people of the State where such lands are situated.

§ 12. According to the doctrine of our republican law, all private title to land within the United States, is derived ultimately, as we have seen, from grants of the State, or general governments, or from royal grants prior to the Revolution, confirmed by those governments.¹ These grants to the original proprietors, — of which the manor lands in New York may be cited as instances,² — were frequently of very large extent, and, from the inability of the proprietors to cultivate them, could have been of but little use to the owners, so long as they remained entire in their hands; while the public would necessarily want that strength and security which land, well peopled and cultivated, invariably produces. Hence it became necessary and proper to subdivide these large tracts amongst those who would cultivate and improve the land, to the advantage, not only of the proprietor, but of the public.

§ 13. The return usually made by tenants employed in the cultivation of land was an annual contribution of corn, cattle, or other produce; or in the performance of some service, either in the family of the proprietor or upon the farms which he retained in his possession. In proportion, however, as agriculture improved and money increased, it was found that these services, although burdensome to the tenant, were of little advantage to the proprietor; and that the produce of a large estate could be much more conveniently disposed of by the farmers themselves, who raised it, than by the landlord or

¹ *Fletcher v. Peck*, 6 Cranch, 87; *Jackson v. Waters*, 12 Johns. 865.

² In this State certain purchasers, or, as they were variously called, patentees, patroons, or lords, early obtained from the British sovereigns letters-patent, granting large districts in the central regions of the Colony. Some of these proprietors, in a spirit of emulation then deemed harmless and laudable, obtained permission from the Crown to erect manors within these districts, with certain political, judicial, and legislative privileges and advantages, which have long since become obsolete. With reference to those advantages, however, they adopted a system of granting lands, not absolutely in fee-simple by deeds, but as qualified estates in fee-simple, by instruments which are commonly called leases, whereby the patroon or landlord reserved for his own use all water-power and mineral wealth. Perpetual rents were reserved; portions of which were paid in wheat and supplies for the table of the proprietor, and the residue in services or labor, to be performed by the tenants about his manor-

house. Alienation by the tenants was restrained, unless with the lord's consent, to be obtained by paying to him one-quarter, or some other part of the purchase-money. The right to distrain for rent — a severe but not then unusual legal remedy — was incorporated in the leases, with stringent covenants for the payment of taxes and other purposes; and with various conditions securing to the landlord a right to re-enter and resume the land. However unwise for both contracting parties such conveyances may now seem, it ought to be remembered, that, at the time of their institution, they were not at all anomalous, and they contributed to the settlement of extensive districts by an industrious population, who had not sufficient capital to become absolute purchasers of estates. The validity of these leases in fee, reserving a perpetual rent, the source of much angry litigation, has been at length definitely established by the court of last resort, in the cases of *Van Rensselaer v. Hays*, 19 N. Y. 68; and *The Same v. Ball*, id. 100; *Van Rensselaer v. Barringer*, 39 N. Y. 9.

his bailiff, who was formerly accustomed to receive it. A commutation was therefore made of *rents* for *services*, and of money for those in kind; and as men in a subsequent age discovered that farms were better cultivated where the farmer enjoyed a security in his possession, the practice of granting leases for a fixed period at length generally prevailed. Such appears to have been the origin of farming leases; while in cities and towns, it is obvious, the investment of money in houses, whose rental will produce a convenient periodical income, naturally presents one of the most certain and regular returns for the employment of capital; conferring, at the same time, an important benefit upon men of moderate means, by enabling them to occupy hired houses and stores, and to devote the whole of such capital as they possess, to the purposes of commerce. The terms and duration of possession, and the mode of enjoyment, in either case, necessarily assume the shape of a contract, *express* or *implied*, which constitutes a *lease*; while the parties themselves are placed in the relation of landlord and tenant.

CHAPTER I.

THE CREATION OF A TENANCY.

§ 14. THE relation of landlord and tenant subsists by virtue of a contract, express or implied, between two or more persons for the possession of lands or tenements, in consideration of a certain rent to be paid therefor. The contract itself is called a *lease* or *demise*, and is a species of conveyance for life, for years, or at the will of one of the parties, usually containing a reservation of *rent* to the *lessor*. The rent may consist in the payment of a certain sum of money, or its equivalent, at particular specified periods during the term, or in one entire sum on the completion of the contract. But a stated rent is not essential to the contract; because, from favor, or for a consideration passing to the lessor at the time of its inception, a lease, beneficial in its nature to the lessee, may be made without any reservation of rent.¹ Independent of the idea of a contract, a lease also possesses the property of passing an interest, and thence partakes of the nature of an estate, which, when limited to a certain period for the enjoyment of land, becomes a *term* for years; but, if it depends upon the duration of a life or lives, rises to the dignity of a freehold.²

¹ Hunt v. Comstock, 15 Wend. 667; Dolittle v. Eddy, 7 Barb. 74; 4 Cruise, 16; Orleans Theat. Ins. Co. v. Lafferranderie, 12 Rob. La. 472. The agreement implied by a demise, that the lessee shall quietly enjoy the premises, is a sufficient consideration for the lessee's agreement to pay rent. Vernam v. Smith, 16 N. Y. 327; Whitney v. Lewis, 21 Wend. 131. But a promise by a tenant, holding under a lease by deed, to pay an additional sum for the use of a part of the premises, was held to be without consideration, and consequently void. Tryon v. Mooney, 9 Johns. 358.

² The particular regard which the common law shows to the tenant of a freehold, and the preference given to him above a tenant for years, depends upon feudal principles which have no application to the condition of society under a republican government. In feudal times

this estate was, perhaps, more valuable and permanent than an estate for years, as long terms were then unknown. It may have been more honorable, as a proof of military tenure, which embraced privileges only allowed to tenants of the King who took the oath of fealty, — an oath which was never permitted to be taken by any whose estate was less than for life. But will any one, in our commercial age, assert, that an estate for the life of any man is of as much value, intrinsically, or entitled to equal consideration with a term of a hundred years? The Revised Statutes of New York have modified this doctrine by making the interest of a lessee an estate in land, and declaring it to be subject to the lien of a judgment, and liable to taxation, and to be sold under execution, the same as real estate. 1 R. S. 722. Trustees, &c., v. Dunn, 22 Barb. 402; 7 Wend.

§ 15. The estate of a lessee for years is called a term, *terminus*, because its duration is limited and determined; for every such estate must have a certain beginning and a certain end. It is perfected only by the entry of the lessee; for, before the time fixed for entry, the whole estate remains in the lessor, and the lessee has strictly no estate in the land, but merely a right thereto which is called an *interesse termini*,¹ an interest which, though assignable, cannot be the foundation of a release, to operate by way of enlargement, from the lessor, nor will it qualify the owner to maintain an action of trespass or ejectment.²

But after the period fixed for the commencement of the lease, though the lessee's interest is still called an *interesse termini*, and he cannot maintain trespass,³ if he is not actually in possession, he may maintain ejectment,⁴ and has enough estate to be divested by an adverse entry,⁵ and though it will neither merge nor can it be surrendered, because until entry the lessor's estate is not a reversion,⁶ yet the title has passed from the latter to the lessee completely.⁷ The lessee may enter at any time notwithstanding the death of his lessor, and after entry he becomes absolute owner of the premises for the term granted, the instrument taking effect from the time of its execution. But the entry of the lessee is not necessary to entitle the lessor to sue for rent, since it becomes due by virtue of the contract and not by reason of the entry; except in the case of a lease at will, where rent becomes due only in consequence of the occupation.⁸

468. It goes to the executor, however, as personal assets of the testator, and does not descend as real estate to the heir at law, 2 R. S. 82, § 6. The vendor of a term of years has no lien for unpaid purchase-money after he has parted with the possession, as if it were real estate. *Cade v. Brownlee*, 15 Ind. 369.

¹ *Williams v. Bosanquet*, 1 Brod. & B. 238; Co. Lit. 46, b; *Copeland v. Stephens*, 1 B. & A. 598, 606. But it is otherwise where the instrument of demise takes effect under the statute of uses. *Smith, Landl. & T.* 12.

² *Saffyn's case*, 5 Co. 123 b; Co. Lit. 46; 2 Bl. Com. 64, 144, 314. "A release to him before entry," says Littleton, "is void." In *Wood v. Hubbell*, 10 N. Y. 488, relief in equity was granted to one entitled to an *interesse termini*, where the premises were destroyed by fire before the term began. See *La Farge v. Mansfield*, 31 Barb. 345.

³ Co. Lit. 296, b; *Wheeler v. Montefiore*, 2 Q. B. 133; *Litchfield v. Ready*, 5 Exch. 939; *Lowe v. Ross*, *ib.* 553; *Harrison v. Blackburn*, 17 C. B. n. s. 678.

⁴ *Gardner v. Keteltas*, 8 Hill, 382; *Trull v. Granger*, 8 N. Y. 115; *Whitney v. Allaire*, 1 N. Y. 311; *Tyler v. Heidorn*, 46 Barb. 489, 455; *Doe v. Day*, 2 Q. B. 156; *Ryan v. Clark*, 14 *id.* 65; though otherwise in Pennsylvania: *Sennett v. Bucher*, 3 Penn. 393.

⁵ *Saffyn's case*, *supra*.

⁶ *Doe v. Turner*, 5 B. & C. 111; Co. Lit. 338, a; *ib.* 270, a.

⁷ Thus in *Ryan v. Clark*, *supra*, a tenant holding over was allowed to maintain trespass against his lessor for entry on his premises after a demise to a third party, *Patteson, J.*, saying, "The interest and legal possession when the term is commenced immediately, and not in future vests in the lessee before entry."

⁸ *Bellasis v. Burbrick*, 1 Salk. 209;

§ 16. A *term* signifies not only the limitation of time, or period granted to the lessee, for the occupation of the premises, but it includes also the estate and interest in the land that pass during such period. The words lease and demise are often used to signify the estate or interest which is conveyed, but they properly apply to the instrument or means of conveyance. And it is essential to a lease, that some reversionary interest be left in the lessor;¹ for if by an instrument purporting to be a demise, he parts with his whole interest in the premises, or makes a lease for a period exceeding his own term, it will, in either case, amount to an *assignment* of the term.² But if a lessee disposes of the term granted to him, reserving any portion thereof, however small, the instrument will operate as an *under lease*.³ And the materiality of the distinction consists in this, that, while an assignee is liable to the original lessor for all the obligations of the lessee, by virtue of the privity of estate that subsists between them, no action can be maintained by the lessor against an under-tenant, upon any covenant contained in the lease, since there is neither privity of estate, nor of contract between himself and the sub-lessee.⁴

Hardy v. Winter, 38 Mo. 106. But see Caldwell v. Centre, 30 Cal. 539, 542. The time between the making of the lease, and that for its commencement in possession, is no part of the term granted by it. Young v. Dake, 5 N. Y. 463.

¹ Harker v. Birkbeck, 3 Burr. 1556; 1 Black. 482.

² Pluck v. Digges, 2 Hud. & Br. 1; Hicks v. Downing, 1 Ld. Ray. 99.

³ Van Rensselaer v. Gallup, 5 Den. 454. Thus Piggott v. Mason, 1 Paige, 412; Davis v. Morris, 36 N. Y. 569, where the last day was reserved; Crusoe v. Bugby, 8 Wils. 234, where three months. So where sub-lessee covenants to re-deliver on the last day, Collamer v. Kelley, 12 Iowa, 319; Martin v. O'Connor, 43 Barb. 514; Kearney v. Post, 2 N. Y. 894. In Linden v. Hepburn, 3 Sandf. 668; People v. Robertson, 39 Barb. 9; reservation of rent and right of re-entry was held a sufficient reversion, but this last case is maintainable on another ground, and the former is contrary to settled authority. 2 Preston, Conv. 124; Doe v. Bateman, 2 B. & A. 168, where right of re-entry, and Wollaston v. Hakewill, 3 Scott, N. R. 616, where greater rent was reserved.

⁴ The doctrine of the text seems established in England after considerable variance in the cases. These have generally arisen between the lessee and the party to

whom he has transferred his whole term by an instrument in form a demise, and the former has been held to have no reversion left or right derivable therefrom, such as the right to distrain; thus the contrary doctrine maintained in Pluck v. Digges, 2 Hud. & Br., 1; and King v. Wilson, 5 Mann. & R. 157 note, is now overruled. Pluck v. Digges, 5 Bligh, n. s. 31; Farmer v. Webber, 8 Taunt. 593; Fitzgerald v. O'Connell, 1 Jo. & La. T. 134, 156; Hicks v. Downing, 1 Ld. Ray. 99; Preece v. Corrie, 5 Bing. 24; in Langford v. Selmes, 3 Kay & J. 220, the doctrine contended for in 5 Mann. & R. 157 n, that tenure may still subsist between lessee and his transferee without a reversion in the former is controverted; and in Wollaston v. Hakewill, *supra*, such a transferee was held liable to the lessor in an action of covenant. But it seems equally well settled that if the parties intend a lease, the relation of landlord and tenant, as to all but strictly reversionary rights will arise, though the lessee demises his whole term. In Poulteney v. Holmes, 1 Stra. 405, such a transfer was held a lease because void as an assignment. This was affirmed in Preece v. Corrie, 5 Bing. 24, in Baker v. Gostling, 1 Bing. N. C. 19, where the rent reserved was held technically rent, and barred by an eviction, and in Pollock v. Stacy, 9 Q. B. 1083, where an action of

§ 17. As to what property may be demised, it is a general rule that any thing corporeal or incorporeal, lying in livery or in grant, may be the subject of a demise. And, therefore, not only lands but commons, ways, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments, are included in the common-law rule.¹ Goods, and other personal chattels, may also be demised; but, although rent cannot be said, technically, to issue out of them, the contract for its payment is valid, and an action for rent in arrear may be maintained upon such leases; while the lessee is liable at the end of the term for the non-delivery of the articles themselves, or their value, as any other bailee.² And we may here observe, that the attempt of the tenant to sell any of them, determines the tenancy as to such articles, and the general owner may sue either the tenant who sold the property, or the purchaser in trover, for a return of the things themselves.³

§ 18. It is frequently found convenient, also, to include the sheep or other live-stock, and farming implements upon land, or the furniture and other chattels in a house, in the contract of

use and occupation was held to lie. So on such a demise ejectment lies. *Doe v. Bate-man*, 2 B. & A. 168; *Hogan v. Fitzgerald*, 1 Hud. & Br. 77 n.; *Walsh v. Feely, Jones (Ir.)* 418; or debt or covenant for rent, *Baker v. Gostling*, *supra*; *Ards v. Watkin*, Cro. El. 637, 651; *Williams v. Hayward*, 1 Ellis & E. 1040. In the United States, the law seems to be the same, and while the right of distress is gone; *Ragsdale v. Estis*, 8 Rich. 429; *Prescott v. Deforest*, 16 Johns. 150; and the term returning, though by demise, to the lessor merges, for want of a reversion, *Shepard v. Spaulding*, 4 Metc. 416; *Smiley v. Van Winkle*, 6 Cal. 605; yet the lessee may create the relation of landlord and tenant without retaining a reversion, *Tyler v. Heidorn*, 46 Barb. 439; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Same v. Read*, 26 N. Y. 576; may have ejectment, *Same v. Slingerland*, 26 N. Y. 580; *Tyler v. Heidorn*, *supra*; covenant or debt for rent, *Patten v. Deshon*, 1 Gray, 325; *Demarest v. Willard*, 8 Cow. 206; *Willard v. Tillman*, 2 Hill, 274; *Wallace v. Harmstad*, 44 Pa. St. 492; or summary process, see *Shumway v. Collins*, 6 Gray, 227; *Blumenberg v. Myres*, 32 Cal. 93. So *Den v. Post*, 1 Dutch. 285, where a covenant not to underlet was held to include an under-lease for the whole term.

The effect of a demise by the lessee of his whole term is, therefore, to divest him of his reversionary rights, and render his lessee liable as assignee, to the lessor; but

at the same time the relation of landlord and tenant is created between the parties to the demise if they so intended.

¹ *Shep. Touch.* 268; *Bac. Abr. Leases (A.)*; *Comm'rs v. Clark*, 38 N. Y. 251; *Taylor v. Beebe*, 3 Rob. N. Y. 262.

² *Zule v. Zule*, 24 Wend. 76. But in *Fay v. Holloran*, 35 Barb. 295, the technical rule was applied, and on lessor's decease no apportionment of rent was allowed, for stock, parcel of demise, because rent issues only from land. So in *Sutcliffe v. Atwood*, 15 Ohio, n. s. 186, the assignee of a lease of lands and stock was held liable for the whole rent, though he did not get the stock. So *Allen v. Culver*, 8 Den. 884; *Spencer's case*, 5 Co. 16, 3d resolution; *Newman v. Anderton*, 5 B. & P. 224; *Farewell v. Dickinson*, 6 B. & C. 251; *Salmon v. Matthews*, 8 M. & W. 827.

The contrary doctrine was laid down in *Mickle v. Miles*, 31 Pa. St. 20; and rent from chattels held distrainable. So in *Newton v. Wilson*, 3 Hen. & M. 470, rent from chattels, parcel of the demise, was held apportionable; and as no eviction can take place from a part of demise from which no rent flows, *post*, § 385, it would be absurd that on a demise of a farm valuable only for the stock or of a shop for its machinery, the lessor might take the stock or machinery, and the lessee be still held for the rent.

³ *Swift v. Mosely*, 10 Vt. 208; 23 *id.* 1; *Farrant v. Thompson*, 5 B. & A. 828; *Billings v. Tucker*, 6 Gray, 368.

lease ; and they have hence, to a certain degree, acquired demisable qualities, although the interest which passes to a lessee is very different from that which is transferred by the lease of a house, land, or other hereditament. The lessee has the use of them during the term, and is restrained from destroying, selling, or giving away any part of them ; but the lessor's reversionary interest is considered of so precarious a nature as to be accounted in law a mere possibility ; no lease or grant can, consequently, be made of them, during or after a term in possession, until the lessee has redelivered them. And in case of a lease of live-stock, the absolute property of such as die vests in the lessee ; as also do the calves, lambs, or other produce of such stock, which are considered to be profits, severed from the principal, in compensation for the rent paid by the lessee. It is usual in such leases, to annex a schedule of the several articles, and insert a covenant upon the part of the lessee, to redeliver them at the end of the term ; and without such covenant the lessor is said to have no other remedy at law but trover or detinue for them, after the lease is ended.¹

SECTION I.

A TENANCY BY IMPLICATION.

§ 19. The relation of landlord and tenant may be created, either by implication or by express contract. The law will, in general, imply the existence of a tenancy, wherever there is an ownership of land on the one hand, and an occupation by permission on the other ; for in all such cases it will be presumed that the occupant intended to pay for the use of the premises. A tenancy will also be implied, in many cases, where there has been no distinct agreement between the parties, or where from various causes, the agreement may have ceased to be operative. Thus, the permissive occupation of premises, previous to, or pending the execution of a

¹ Putnam v. Wyley, 8 Johns. 432 ; Newton v. Wilson, 3 Hen. & M. 470 ; Co. Lit. 57, a ; Spencer's case, 5 Co. 16, b ; Billings v. Tucker, 6 Gray, 368. A lease of land embraced certain personal chattels, which it was declared should be a part of the premises demised, and should remain on the premises at the end of the term, or be replaced or paid for by the lessee ; and the covenant to surrender the demised premises at the end of the term, contained an exception of *damages by the elements* ; and the chattels were destroyed by accidental fire during the term. It was held, that the lessee was not bound to replace or pay for them ; the last-mentioned covenant modifying the strict terms of the other. Allen v. Culver, 8 Den. 284.

lease, or the payment of rent under an invalid agreement, are circumstances from which this relation will be implied, sufficient to authorize the collection of subsequently accruing rent.¹ And, if a man enters under a void lease, he cannot be treated as a disseisor, but becomes a tenant at will.² So the taking of the key of a house, for the purpose of occupying it, but without going into the actual occupation, has been held to imply a tenancy.³ And, as a general rule, it may be stated that the mere occupation of land, with the owner's concurrence, will enure as a tenancy from year to year, or at will, according to circumstances, determinable at the pleasure of the owner.⁴

§ 20. The intention to create a tenancy may also be inferred from a variety of other circumstances; as where lands descended to an infant, with respect to whom the tenant in possession was a trespasser, and an action of ejectment was brought and compromised by the infant's attorney upon certain terms, one of which was that the tenant should attorn to the infant, a tenancy was held to be thereby created, although the infant had not assented to it, nor received rent since he came of age.⁵ And a similar result was said to have been produced where a *feme covert* lived separate from her husband, and received to her separate use the rents of certain lands, which came to her by devise, after separation; it was presumed she received such rents by her husband's authority, and held that he could not maintain ejectment, at least before giving notice to the tenant to quit.⁶ So where the owner of a house

¹ *Hamerton v. Stead*, 3 B. & C. 478; *Dunne v. Trustees*, 39 Ill. 578; *Pinero v. Judson*, 6 Bing. 206; *Anderson v. Midland R. R.* 30 L. J. Q. B. 94. But where the occupation is not with owner's consent, no tenancy arises. *Ackerman v. Lyman*, 20 Wisc. 454. A notice to quit is a recognition of an existing tenancy. *Doe v. Miller*, 2 C. & P. 348. An occupant is one who has the actual use or possession of a thing; and occupancy implies the exclusion of every one else from enjoyment. *Redfield v. Utica & Sy. R. R.*, 25 Barb. 54.

² *Digby v. Atkinson*, 4 Camp. 275; *Denn v. Fearnside*, 1 Wils. 176; *Doe v. Watts*, 7 T. R. 83.

³ *Little v. Martin*, 3 Wend. 219.

⁴ Any person entering into demisable premises by the consent or connivance of the tenant becomes a tenant. *Benson v. Bolles*, 3 Wend. 175; *Jackson v. Miller*, 6 *id.* 228; *Graves v. Porter*, 11 Barb. 592;

See *Hall v. Western Transportation Co.*, 34 N. Y. 284. Where land is in the possession of one man which belongs to another, an obligation to pay rent will be implied, unless there is an express disclaimer to hold under such other. *Jackson v. Mowry*, 30 Ga. 14. Where a tenant for years made a conveyance in fee, of the premises, under which the grantee entered, he was held to be in as assignee of the tenant. *Jackson v. Davis*, 5 Cow. 128; for a deed conveys only the interest of the grantor. 1 N. Y. R. S. 739, § 143. *Doe v. Brown*, 8 East, 165. An action for use and occupation of premises may arise from the mere waiver of a tort, or the simple letting into possession. Per *Patteson, J.*, in *Church v. Imp. Gas Light Co.*, 6 Ad. & E. 854.

⁵ *Doe v. Noden*, 2 Esp. 580.

⁶ *Doe v. Biggs*, 1 Taunt. 367; 1 Russ. & M. 237.

agreed that his creditor might occupy it for one year, and until he paid a mortgage held by such creditor; and where one entered upon premises, under an agreement to accept a lease for a certain period, but subsequently refused to accept it; in each case the relation of landlord and tenant was held to exist.¹

§ 21. But if no rent has been paid, and no concurrent act of the parties, or other circumstance exists, from which consent to a tenancy may be inferred on the part of the owner, or if such consent was conditional and has since been forfeited, a tenancy cannot arise from mere occupation. For if a man gets into a house without the privity of the owner, although they may afterwards enter into a negotiation for a lease, but differ about the terms, and the negotiation goes off; or if, after being let into possession, under an agreement to sign a written lease, and find surety for the rent, he does neither; no species of tenancy is created, but the occupant, in either case, becomes a mere trespasser.²

§ 22. It has been held that a tenant holding over after the expiry of his term without paying rent or acknowledging a continuance of his tenancy was either a trespasser or a tenant at will, or from year to year at the lessor's election, but that slight acts on the lessor's part or even mere lapse of time³ would be sufficient to conclude that election and fix the former as tenant. The tenant, however, was held to have no such election.⁴ But this has been denied, and the sounder doctrine seems to be that the tenant holding over and being therefore at sufferance, while he may become a trespasser by the landlord's entry, can only be a tenant by mutual agreement.⁵ So the occupant of a house, by submitting

¹ *Hunt v. Comstock*, 15 Wend. 665; *Anderson v. Prindle*, 23 Wend. 616.

² *Doe v. Pullen*, 2 Bing. N. C. 749; *Doe v. Quigley*, 2 Camp. 505; *Doe v. Cartwright*, 3 B. & A. 326; *Fisk v. Moores*, 11 Rob. La. 279; *Doe v. Butt*, Walm. & H. 8, where party let in on condition of finding security, held no tenant after two years' stay. So on the other hand, if the owner agrees to give a lease and the tenant enters, but the owner then refuses, and tenant quits, he is not liable for use and occupation. *Greton v. Smith*, 33 N. Y. 245. The relation of landlord and tenant can only arise where he who is in possession has, by some act or agreement, recognized the other as his landlord, and taken upon himself the character of a tenant under him, so that he is not at liberty afterwards

to dispute his title. Per McCoun, J., in *Benjamin v. Benjamin*, 5 N. Y. 388.

³ *Rowan v. Lytle*, 11 Wend. 616.

⁴ *Conway v. Starkweather*, 1 Den. 113; approved in *Blumenberg v. Myres*, 32 Cal. 93, 97; *Witt v. New York*, 5 Rob. N. Y. 248; but the former was a *dictum*, and the latter a tenancy from year to year, where the intent to hold a second year is conclusively presumed from any holding over the first.

⁵ *Edwards v. Hale*, 9 Allen, 462; so *Ackerman v. Lyman*, 20 Wisc. 464, one entering without owner's consent, cannot be held by him as tenant at his election; *Russell v. Fabyan*, 34 N. H. 218, where the tenant held over, and the court say, "the reply of the tenant negatives any consent on his part to remain as tenant." And in the

to a distress for rent, which is stated, in the notice of a distress for rent, to be due by him to the party distraining, acknowledges a tenancy from such party.¹ And where a tenant, after the expiration of his term, remained in possession, claiming to hold until the landlord should pay him the appraised value of the improvements he had made during his term, which by the terms of the lease the landlord was bound to do; it was held that the tenant was not discharged from the payment of rent, but was subject to the general rule, that a tenant holding over after the expiration of his lease, with the consent of the landlord, becomes a tenant from year to year, subject to the terms and conditions of the original lease.²

§ 23. But the receipt of rent is only a *prima facie* acknowledgment of the existence of a tenancy; for where the amount received is trifling, or does not appear to have been paid as rent, or bears no proportion to the real value of the premises, the rule does not apply.³ And if a lease is not void, but voidable only, the mere receipt of rent under it does not create a new tenancy, although it establishes the former one.⁴ Nor will a new tenancy be created by a mere agreement for an increase of rent in the middle of a term.⁵ Nor if, after a tenancy has expired by its own limitation, the landlord merely neglects to take possession of the premises, if he does no act in the mean time recognizing the party as his tenant.⁶ And in general, if rent is not paid and received *as such*,

leading case, *Right v. Darby*, 1 T. R. 159, 162, Ld. Mansfield says, "If there be a lease for a year and by consent of both parties the tenant continue, they are supposed to have renewed the old agreement which was for a year." In *Ibbs v. Richardson*, 9 Ad. & E. 849, the tenant holding over was sued for a year's rent as holding from year to year, but held liable only for time he had occupied. So see *Levi v. Lewis*, 6 C. B. x. s. 766; and until such agreement, the tenant is liable only for the time he occupies. See cases cited *supra*. So per *Patterson, J.*, *Church v. Gas Co.*, 6 Ad. & E. 854; and *Littledale J.*, in *Ibbs v. Richardson*, 9 Ad. & E. 853, that the lessor may waive tort and sue for use and occupation.

¹ *Panton v. James*, 3 Camp. 372. Payment of a quarter's rent, by a person in actual occupation, is sufficient evidence of a yearly tenancy, at the rent indicated by the payment payable quarterly. *Morris v. Niles*, 12 Abb. Pr. 103; *Richardson v. Langridge*, 4 Taunt. 128; *Knight v. Benett*, 3

Bing. 361; *Bolton v. Tomlin*, 5 Ad. & E. 856. So where a mortgagee, notwithstanding a former lease of the property, acknowledged himself to be in possession, and promised to pay rent, he was held to have thereby created the relation of landlord and tenant. *Goodman v. Jones*, 26 Conn. 264.

² *Holsman v. Abrams*, 2 Duer. 435. The landlord, however, is subject to the same rule, and can recover no more than the rent originally reserved. He is not entitled to an increased rent, proportioned to the increased value of the premises.

³ *Right v. Bawden*, 8 East, 260; *Doe v. Wilkinson*, 8 B. & C. 413; *Den v. Rawlins*, 10 East, 261; *Claridge v. Mackenzie*, 4 M. & G. 143; *Doe v. Baston*, 11 Ad. & E. 807; *Doe v. Brown*, 7 id. 447.

⁴ *Doe v. Bancks*, 4 B. & A. 401.

⁵ *Doe v. Kendrick*, cited *Adams on Eject.* 129; *Geechie v. Monk*, 1 Car. & K. 370.

⁶ *Cobb v. Stokes*, 8 East, 358. After treaty for a lease, forcible possession taken and rent paid to another are no evidence of a contract of lease. *Marwood v. Waters*,

but stands upon some other consideration, it will not be considered as evidence of a design to establish a tenancy.¹

§ 24. A mere participation in the profits of the land with a joint occupation, or an occupation which does not exclude the owner from possession, will not amount to a tenancy; as was held in a case where the provisions of an agreement between the defendant and a hotel company were, that the defendant should reside with his family in the hotel, free of charge for board, conduct the same in the manner contemplated by the parties, and have the exclusive management thereof, and that the furniture, at the end of the term, should be restored to the company by the defendant.² So, if land is let *upon shares*, it does not amount to a lease with the rent to be paid in produce; for the possession of the land remains in the owner, and the parties are merely tenants in common of the crop.³ But if the lessee agrees to pay a certain part of the crop expressly as *rent*,⁴ or if he holds the land with the usual privileges of an exclusive enjoyment, it is in general the creation of a tenancy for the time agreed upon, though the land may be taken to cultivate on shares.⁵ But the technical form of a lease reserving rent has been held not to create a tenancy of the land between the parties, but only a tenancy in common of the crops, if the agreement also was that the crops should be divided between them, as the amount of render was uncertain and therefore not properly rent.⁶

13 C. B. 820. Nor will a verbal license by a tenant to the landlord for the occupation by the latter of part of the demised premises at a certain rate, vary a written agreement between them as to the amount of rent. *Hilton v. Goodhind*, 2 C. & P. 591.

¹ *Right v. Bawden*, 3 East, 280; *Denn v. Rawlins*, 10 East, 261. The payment of rent to constitute a tenancy, must be paid by the party in the capacity of tenant. *Strahan v. Smith*, 4 Bing. 91. And its mere payment is no evidence of any particular manner of holding. *Phillips v. Mosely*, 1 C. & P. 262.

² *State v. Page*, 1 Spear, 408; *Walker v. Fitts*, 24 Pick. 191; *Johnson v. Carter*, 16 Mass. 443. One staying at an inn or hotel is a guest, and not a tenant. *Bac. Abr. tit. Inn, c. 5, 6*. A contract for board and lodging at a hotel or boarding-house does not create the relation of landlord and tenant. *Wilson v. Martin*, 1 Den. 602; nor to work on a farm for a year, *Haywood v. Miller*, 3 Hill, 90. So in *Funk v. Haldeman*, 53 Pa. St. 229, a deed conveying right to enter and prospect mines, with

exclusive right to one acre round each mine, was held not to exclude the owner, and to be no lease, but a license only.

³ *Oakley v. Schoonmaker*, 15 Wend. 226; *Maverick v. Lewis*, 3 McCord, 211; *Bradish v. Schenck*, 8 Johns. 151. Authority to dredge for oysters is a license, and not a lease passing the possession. *Colchester v. Brooke*, 7 Q. B. 339. So where a person employed in a particular capacity is permitted to occupy a house as incidental thereto, for which a sum is deducted from his wages, he cannot on being dismissed from employment be regarded as a tenant. *Hunt v. Colson*, 3 Moore & S. 790. But see *Hughes v. Chatham*, 5 M. & G. 54.

⁴ *Hoskins v. Rhodes*, 1 Gill & J. 266; *Newcomb v. Agan*, 2 Johns. 421; *Alwood v. Ruckman*, 21 Ill. 200.

⁵ *Jackson v. Brownell*, 1 Johns. 267; *Tuttle v. Bebee*, 8 Johns. 152; *De Mott v. Hagarman*, 8 Cow. 220; *Doremus v. Heward*, 3 Zab. 390; *Fry v. Jones*, 2 Rawle, 11; *Haywood v. Miller*, 3 Hill, 90.

⁶ *Putnam v. Wise*, 1 Hill, 234. It may

§ 25. Nor will the relation of landlord and tenant be inferred from occupation, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause.¹ As, for instance, between the vendor and vendee of land, where the purchaser has possession until the agreement for purchase is completed or rescinded; for possession was evidently taken in such case, with the understanding of both parties, that the occupant should be owner and not tenant; and the other party cannot, without his consent, convert him into a tenant, so as to charge him with rent; but if the vendee remains in possession after the agreement is ended he is liable in use and occupation for

be doubted if this does not carry the doctrine too far. The ancient common law declared parties tenants in common of the crop, and the lessor still possessed of the land, if the agreement was for one crop only. *Hare v. Celey*, Cro. El. 148; *Bradish v. Schenck*, 8 Johns. 151; *Bishop v. Doty*, 1 Vt. 37; but where for more than one crop it made a lease, *Stewart v. Dougherty*, 9 Johns. 108. But other and later decisions have rejected this test; *Moulton v. Robinson*, 7 Fost. 550; *Aiken v. Smith*, 21 Vt. 180; *Putnam v. Wise*, 1 Hill, 246; and rested solely on the terms made use of, construing the agreement a lease wherever rent was reserved or terms of demise employed, or intention to that effect otherwise clearly appeared. *Fry v. Jones*, 2 Rawle, 11; *Newcomb v. Agan*, 2 Johns. 421, n.; *Jackson v. Brownell*, 1 Johns. 267; *Hurd v. Darling*, 14 Vt. 214; 16 *id.* 377; *Manwell v. Manwell*, 14 *id.* 14; *Burns v. Cooper*, 31 Pa. St. 426; *Lamberton v. Stouffer*, 55 *id.* 284; *Steele v. Frick*, 56 *id.* 172; *Alwood v. Ruekman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 *id.* 372; *Wells v. Preston*, 25 Cal. 59, 67; *Ross v. Swaringen*, 9 Ired. 481; *Hatchell v. Kimbrough*, 4 Jones, 163; *Blake v. Coats*, 3 Iowa, 548; *Rees v. Baker*, 4 *id.* 461; *Hoskins v. Rhodes*, 1 Gill & J. 266; and have even held the agreement to "deliver" the landlord's part of crop, to show a lease. *Rinehart v. Olwine*, 5 W. & S. 157, 163; *Ream v. Harnish*, 45 Pa. St. 379; *Blake v. Coats*, *supra*; *Symonds v. Hall*, 37 Me. 354. But as this doctrine left the crop the lessee's until delivery, the lessor lost all specific right thereto; and to protect him the courts in some States were led to construe an agreement expressed as a lease, not a lease, but a tenancy in common of the crop, wherever a division uncertain in amount was stipulated for. *Putnam v. Wise*, 1 Hill, 234; and see *Smyth v. Tankersly*, 20 Ala. 212; *Bernal v. Hovious*, 17 Cal. 641; *Lowe v.*

Miller, 3 Gratt. 205; *Aiken v. Smith*, 21 Vt. 172; and it was implied that the same relation existed as to the land; and this was distinctly held in later cases; *Dinehart v. Wilson*, 15 Barb. 695; *Harrower v. Heath*, 19 *id.* 331. Where there are no clear terms of demise this is, undoubtedly, the relation of the parties; *Caswell v. Districh*, 15 Wend. 379; *Otis v. Thompson*, Hill & Den, 131; *Foot v. Colvin*, 3 Johns. 216; *Guest v. Opdyke*, 31 N. J. 552; *Fiquet v. Allison*, 12 Mich. 330; *De Mott v. Hagarman*, 8 Cow. 220; and where neither demise, rent, or exclusive occupation is agreed upon, but services to be paid in part of the crop, the occupant is not even tenant in common, but a mere cropper, with no interest until division. *Walker v. Fitts*, 24 Pick. 191; *Chase v. McDonnell*, 24 Ill. 236; *Chandler v. Thurston*, 10 Pick. 205; *Maverick v. Lewis*, 3 McCord, 211; *Adams v. McKesson*, 53 Pa. St. 81. But where these are found the sounder view seems to be that there is a lease of the land, and the relation of landlord and tenant arises; and the lessor will either be entitled to his share as it comes into existence by way of reservation, subject only to the tenant's right of possession for purpose of cultivation. *Moulton v. Robinson*, 7 Fost. 550; *Hatch v. Hart*, 40 N. H. 98; *Lewis v. Lyman*, 22 Pick. 437; *Kelly v. Weston*, 20 Me. 232; and see *Ferrall v. Kent*, 4 Gill, 209; *Esdon v. Colburn*, 28 Vt. 631; *Smith v. Atkins*, 18 Vt. 461; or, that if that share is clearly rent, the lessor has no interest therein before delivery; see cases *supra*.

¹ Thus in *Constant v. Abell*, 36 Mo. 174, 181; where the government took possession of demised premises, and paid the lessee rent, it was held that he was not liable to lessor for government's occupation after his term expired, as though he had received rent he had never let the government in.

the period of his occupancy.¹ So the relation of landlord and tenant does not exist where the occupant holds the relation of trustee to the party entitled,² or between vendor and vendee where the vendor retains possession after the sale.³ The same principle applies to the case of a mortgagor and mortgagee; or to that of the tenant of a mortgagor by a demise subsequent to the mortgage, and the mortgagee or his assignee; for no privity of estate exists between them.⁴ So with respect to a guardian or trustee of an infant, or husband seised in the right of his wife only, neither of these persons, holding over after the determination of their respective estates, become tenants in any sense; they are mere intruders and trespassers.⁵ And, as a general rule, a ten-

¹ The vendee's right is a bare right to occupy, — called a strict tenancy at will, — and being nothing more than a license, determinable by mere demand; upon which ejectment lies without any notice to quit. *Doe v. Stanion*, 1 M. & W. 700; *Right v. Beard*, 13 East, 210; *Doe v. Chamberlaine*, 5 M. & W. 14; *Doe v. Edgar*, 2 Bing. N. C. 498; *Doe v. Miller*, 5 C. & P. 595; *Doe v. Jackson*, 1 B. & C. 448; *Jackson v. Deyo*, 3 Johns. 422; *Jackson v. Kingsley*, 17 id. 158; *Jackson v. Miller*, 7 Cow. 747; *Prop's v. McFarland*, 12 Mass. 325; *Doe v. Baker*, 4 Dev. 220; *Love v. Edmonstone*, 1 Ired. 152; *Kratemayer v. Brink*, 17 Ind. 509; *Richardson v. Thornton*, 7 Jones, 458; even though he has paid a portion of the purchase-money; *Banks v. Rebbeck*, 2 Lowndes, M. & P. 452; *Doe v. Stanion*, 1 M. & W. 695; *Ball v. Cullimore*, 2 C. M. & R. 120. He is not estopped to deny the vendor's title; *Watkins v. Holman*, 16 Pet. 25; and neither use and occupation, *Little v. Pearson*, 7 Pick. 301; *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 13 id. 489; *Sylvester v. Ralston*, 31 Barb. 286; *Kirtland v. Pounsett*, 2 Taunt. 145; *Hearn v. Tomlin*, Peake, 192; *Winterbottom v. Ingham*, 7 Q. B. 611; *Corrigan v. Woods*, Ir. R. 1 Com. L. 78; *McNair v. Schwarz*, 16 Ill. 24; *Greenup v. Vernor*, id. 26; *Hadley v. Morrison*, 39 id. 392; nor landlord and tenant process lies, *Dakin v. Allen*, 8 Cush. 33; *Banks v. Rebbeck*, 2 Lowndes, M. & P. 452; *Burnett v. Scribner*, 16 Barb. 621. In *Gould v. Thompson*, 4 Metc. 224, following *Hull v. Vaughan*, 6 Price, 157, vendee was held liable in use and occupation, but this case seems contrary to the weight of authority. In *White v. Livingston*, 10 Cush. 259, the vendee had an agreement for peaceable possession so long as he paid interest on his purchase-note "which both parties treated as rent,"

and there was held to be a lease. This is undoubtedly correct where the money is paid as compensation for the land. *Saunders v. Musgrove*, 6 B. & C. 524. But in the former case it was interest only; and the payment of interest on his purchase-money by the vendee does not make him a tenant; *Doe v. Stanion*, 1 M. & W. 695; *Doe v. Edgar*, 2 Bing. N. C. 498; *Banks v. Rebbeck*, 2 Lowndes, M. & P. 452; and in *Dakin v. Allen*, 8 Cush. 33, where vendee had a verbal agreement to retain possession until payment of a note for five years with interest, he was held not a tenant; *Shaw, C. J.*, saying, "he was to pay a sum of interest semiannually, not for the use of the land grounded on the estimated value of such use, but as forbearance for payment of a sum of money for which he had given his note." See *Dolittle v. Eddy*, 7 Barb. 74.

Where, however, a vendee is already in as tenant, his possession is referred to that, and not to his intended purchase. *Blanchard v. McDougal*, 6 Wisc. 167.

² *Howard v. Shaw*, 8 M. & W. 118; though some expressions in *Smith v. Stewart*, 6 Johns. 46, are *contra*.

³ *Russell v. Erwin*, 38 Ala. 44.

⁴ *Tew v. Jones*, 13 M. & W. 12; *Goldsberry v. Bishop*, 2 Duv. 143; *Currier v. Earl*, 13 Me. 216; *Jackson v. Aldrich*, 13 Johns. 106; *Mott v. Coddington*, 1 Rob. N. Y. 267; *Way v. Raymond*, 16 Vt. 371.

⁵ *Jackson v. Rowland*, 6 Wend. 666; and see *Roach v. Cozine*, 9 id. 231; *Carlisle v. McCall*, 1 Hilt. 399; for by the common law whoever came in by act of law and held over as in case of a guardian, husband, or trustee, became a mere trespasser, *supra*; but he who entered by act of the party entitled to the estate and held over was tenant at sufferance. Such was the case of a tenant *pur auter vie*. *Allen v.*

ancy by implication can never arise, under a party who has not the legal estate of the premises in question.¹

SECTION II.

AN EXPRESS AGREEMENT.

§ 26. When a tenancy is created by an express agreement, it is either by *parol* or by *deed*. The former mode embraces all cases where the parties agree by mere word of mouth or by a writing not under seal. No particular form of expression is necessary, in either case, to create an immediate demise. Any permissive holding is sufficient for the purpose, and may be contained in a series of letters, or in a brief memorandum of the contracting parties; and any phraseology will establish the fact, from which it appears to have been the intention of one of the parties voluntarily to dispossess himself of the premises, and of the other to assume the possession, for any determinate period, whether the words made use of, run in the form of a license, a covenant, or an express agreement.²

§ 27. Leases for years being considered mere chattel interests, arising out of a contract between the parties, passing only a transient interest in the land, and not a freehold, might originally, at common law, have been made by *parol* for any certain period. The contract gave the lessee a right to enter upon the land with a present interest; and when, in pursuance of such right, he entered, the object of the contract was accomplished, the *term* vested in the lessee, the *seisin* in the land still remaining in the freeholder. But as the tenant was never technically seised and held

Hill, Cro. El. 238; *Livingston v. Tanner*, 14 N. Y. 64; *Torrey v. Torrey*, *ib.* 430.

¹ *Morgell v. Paul*, 2 Mann. & R. 308; *Hayward v. Haswell*, 6 Ad. & E. 265. Where a person is in the quiet possession of premises, with the knowledge of the owner, for upwards of a month, and has taken such possession under a purchase from one who claims to have a *parol* lease from the owner, and was in actual possession for two months, he is to be deemed rightfully in possession, so far as to entitle him to occupy (if in the city of New York) till the first of May then next, or at least until the tenancy be terminated by notice. The owner

may not forcibly eject him, and defend the act by showing that such alleged *parol* lease was not binding upon him. *Marquart v. La Farge*, 5 Duer, 559.

² *Moshier v. Reding*, 3 Fairf. 478; *Maverick v. Lewis*, 8 McCord, 211; *Caswell v. Districh*, 15 Wend. 879; *Right v. Proctor*, 4 Burr. 2208; *Chapman v. Bluck*, 5 Scott, 531; *Waller v. Morgan*, 18 Ky. 142. A reservation of rent in some form, and allegiance to the title, are distinguishing characteristics of a contract by which the relation of landlord and tenant is created. Per Sampson, C. J., in *Goldberry v. Bishop*, 2 Duv. 148.

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only in the name of his lord, he could not defend himself in a real action, and was liable to be dispossessed at the pleasure of the tenant of the freehold, by his suffering a common recovery.¹ So precarious an interest, in the tenant, was soon found to be prejudicial to agriculture; inasmuch as there was no encouragement for a tenant to improve and cultivate the land in a proper manner, which was, of course, his principal inducement to take a lease. His interest was rendered less insecure by a change in the law near the end of the reign of Henry VI.,² which gave him a right to recover, when unduly evicted, not only damages for the loss of his possession, but the possession itself. The term, however, became a certain interest by 21 Hen. VIII., which enabled a lessee for years to entirely falsify a recovery to his prejudice under such circumstances; and subsequent enactments have increased its security and permanence.

§ 28. The statute of 29 Car. II. c. 3, which is usually called the statute of frauds, first enacted, as a remedy for many evils arising from parol demises, that all leases, estates, or terms of years, or any uncertain interest in land, created by livery only, or by parol, and not reduced to writing and signed by the party making the same, or his agent, should have no other force or effect than a mere estate at will; excepting leases for a term not exceeding three years, whereupon the rent reserved shall amount to two-thirds of the full improved value of the premises. The leading provisions of this statute have been very generally adopted in the United States. The Revised Statutes of New York declare, "no estate or interest in lands, other than leases for a term not exceeding one year, shall hereafter be created, granted, assigned, or surrendered, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party granting, &c., or by his lawful agent, thereunto authorized by writing." And "every contract for leasing for a longer period than one year shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party, or his lawfully authorized agent."³

¹ Co. Lit. 46, a; Theobalds v. Duffoy, 9 Mod. 102; Shep. Touch. 210.

² Poole v. Errington, 1 Ad. & E. 756, where it is said to have been a judicial change between 6 Rich. II. (A. D. 1383) and 7 Edw. IV. (A. D. 1468). Smith, Landl. & T. 11, says between 1455 and 1458, re-

ferring to 33 Hen. VI. fol. 42, (A. D. 1455,) to show that it had not then occurred.

³ 2 R. S. 135, § 8. In some of the States, the words "authorized by writing," are omitted; in which case it is sufficient that the agent have verbal authority to contract, provided the contract itself

§ 29. In Massachusetts, all estates and interests in land, created without writing, are declared to be estates at will only; while in Connecticut, Missouri, and Ohio, Maine, Vermont, and New Hampshire, no leases of land for a term exceeding a year are valid, except as against the grantor, unless they be made in writing, and are signed by the lessor in the presence of two witnesses, and acknowledged. Pennsylvania, Indiana, and North Carolina follow the English statute, and allow parol leases, not exceeding three years, without adding any thing as to the reservation of rent, or other consideration for the making of the contract. In New Jersey, Maryland, Georgia, and South Carolina, the English statute is exactly followed; but in all the other States the New York statute is adopted.¹

§ 30. By the English statute of frauds also, every agreement not in writing and signed by the party to be charged therewith, or his authorized agent, is void, that, by its terms, is not to be performed within one year from the making thereof. A verbal agreement to lease lands for such time, must therefore, according to the English authorities, commence from the making of the agreement, and cannot be made to commence from a future day.² But the Revised Statutes of New York have omitted the expression, *within one year from the making thereof*, which was held to prohibit the creation of an estate for a year commencing *in futuro*, and the Court of Appeals, in that State, now holds, that a parol lease of lands, for the term of one year, to commence at a period subsequent to the day when the contract is made, is valid.³ A parol agreement by a

is in writing; but his authority to make a deed must still be in writing. Story on Agency, § 50; and see *McWhorter v. McMahan*, 10 Paige, 894; *Champlin v. Parish*, 11 *id.* 406; *Agate v. Gignoux*, 1 Rob. N. Y. 278; *Benedict v. Beebee*, 11 Johns. 145; *Lower v. Winters*, 7 Cow. 268.

¹ Thus in Alabama, Arkansas, California, Delaware, Florida, Illinois, Iowa, Kentucky, Michigan, Mississippi, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin, parol leases for one year are valid. *Browne*, Stat. Fr. Appendix.

² *Rawlins v. Turner*, 1 *Ld. Ray.* 786; *Anon.* 12 *Mod.* 610; and see 1 *W. Bl.* 853; 11 *East*, 142; 1 *B. & A.* 722. So in Massachusetts and Georgia, where similar provisions exist. *Delano v. Montague*, 4 *Cush.* 42; *Kelly v. Terrell*, 26 *Ga.* 551.

³ *Young v. Dake*, 5 *N. Y.* 468, where it was held that the time between the making of the lease and its commence-

ment in possession is no part of the term granted. When, therefore, the statute of New York speaks of a lease for a term not exceeding one year, and of a contract for a lease for a period not longer than one year, it has reference to the time for the tenant to possess and occupy the premises, and does not include any previous or intermediate time. A lease, therefore, for the term of one year may as well be made to commence at a future day, as at the day of making it. If it should not expire until two years from the time it was made, it might still be a lease for only one year. This decision overrules the case of *Lockwood v. Barnes*, 8 *Hill*, 128; also *Plimpton v. Curtis*, 15 *Wend.* 836. A parol contract, however, to give a lease of land for a term exceeding one year is void. *Anderson v. Prindle*, 23 *Wend.* 616; *Phlipps v. Ingraham*, 41 *Miss.* 256; *Shepherd v. Cummings*, 1 *Coldw. (Tenn.)* 854. An

tenant under a sealed lease having several years yet to run, to leave buildings on the premises at the end of the term, is void.¹

§ 31. A grant of the possession of land for permanent use, is an interest within the meaning of the statute, whether it be to enter upon it at all times without fresh consent, or for the purpose of erecting and keeping in repair a house, embankment, or canal, in order to raise water to work a mill, or the like ; and an agreement therefor must consequently be in writing. But a license or authority to enter upon the land of another, to do certain acts, which are merely of a temporary character, without intending to pass an interest in such land, is founded in personal confidence, and valid though not in writing.² The conferring of a right, however, to enter upon lands, and to erect and maintain a dam as long as there shall be employment for the water-power thus created, is more than a license : it is the transfer of an interest in the land, in the nature of a lease, and must therefore be in writing.³

§ 32. Although a parol agreement to grant a lease may be void under the statute as not reduced to writing, it will be enforced in equity when there is a substantial part performance, though on the part of the plaintiff only ;⁴ and a specific performance will be decreed, although signed by one party only.⁵ If possession is delivered under such an agreement, it will be considered as a part

agreement to occupy lodgings at a yearly rent, payable in quarterly portions when the occupation is to commence at a future day, is an agreement relating to an interest in land, within the meaning of the statute of frauds, and must therefore be in writing. *Inman v. Stamp*, 1 Stark, 12.

¹ *Lawrence v. Woods*, 4 Bosw. 354.

² *Cook v. Stearns*, 11 Mass. 538 ; *Phillips v. Thomson*, 1 Johns. Ch. 181 ; *Miller v. Auburn & Sy. R. R.* 6 Hill, 61 ; *Wolfe v. Frost*, 4 Sandf. Ch. 72. The grant of the State, of a franchise for a limited time, after which it is to revert to the State, is not a lease. *Bridge Prop's v. New Jersey*, 1 Zab. 384.

³ *Mumford v. Whitney*, 15 Wend. 380. A mere license is revocable, so long as it is executory, unless a definite term is fixed for its continuance ; but it becomes irrevocable when executed. *Davis v. Townsend*, 10 Barb. 382. A conveyance by the owner, after a license granted, the lessee of the premises being in possession at the time of the conveyance, and not chargeable with notice of it, is not a revocation. But the grantee of such a conveyance is chargeable, where he takes the conveyance with notice of the tenant's

right, among which is the right to remove a building which he or his under-tenant might, before the license which had been given for that purpose should be revoked, have erected upon the premises. The tenant, however, until he has notice of such revocation, may safely act upon the license, and having erected the building, the license will be no longer revocable. *Dubois v. Kelly*, 10 Barb. 496.

⁴ *Jackson v. Pierce*, 2 Johns. 221 ; *Hollis v. Whiting*, 1 Vern. 161 ; *Walker v. Walker*, 2 Atk. 98 ; *Beidelman v. Foulk*, 5 Watts, 308. A parol lease for more than a year, but less than three, which, by the statute of Ohio, is required to be in writing, will be withdrawn from the operation of the statute, and become valid for the term specified, if the lessee takes possession and has paid rent according to the terms of the lease. *Grant v. Ramsey*, 7 Ohio, St. 166. So also in Pennsylvania, *Jones v. Peterman*, 3 S. & R. 548 ; quoting *Earl of Aylesford's case*, 2 Stra. 783.

⁵ *Owen v. Davis*, 1 Ves. sr. 82 ; *Seton v. Slade*, 7 Ves. 265. See the subject of the specific performance of an agreement, treated more at large in section three of this chapter. And see § 36.

performance;¹ especially if the tenant expends money in building or improving, according to the agreement.² But acts which are merely introductory, or ancillary to an agreement, will not be considered as a part performance, although attended with expense.³ And possession must be voluntarily delivered in part performance; for, if the purchaser obtains it wrongfully, it will not avail him.⁴ Nor will a possession which can be referred to a title distinct from the agreement take a case out of the statute, and therefore no such possession by a tenant can be deemed a part performance.⁵

§ 33. The acceptance of a trifling earnest, or payment of money on account, though it may make a personal contract good, is not enough to satisfy the statute where the contract concerns lands.⁶ Even the payment of a considerable sum will not be considered part performance of such a contract.⁷ And although an agreement be in part performed, yet the court, it seems, may not be able to understand its terms, and then the case will not be taken out of the statute.⁸ But the mere circumstance that the terms do not clearly appear, or are controverted by the parties, will not deter the court from taking the best means in its power to ascertain the real terms.⁹ And if a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it.¹⁰

§ 34. The common law required that a freehold should be conveyed only by deed or by livery of seisin without writing. The English statute of frauds abolished the latter, and left the former as the only mode; and this provision, with some modifications, prevails generally in this country. The statutes of many of the States require the conveyance of all freeholds to be by deed,¹¹ and

¹ *Moore v. Beasley*, 3 Ham. 294; *Butcher v. Stapely*, 1 Vern. 368; *Aston v. Aston*, 2 *id.* 452; *Bowers v. Cator* 4 Ves. 91.

² *Lester v. Foxcraft*, Colles, Parl. Ca. 108; *Floyd v. Buckland*, 2 Freem. 268; *Mortimer v. Orchard*, 2 Ves. 243; *Carter v. Boehm*, 3 Burr. 1919. In *Foster v. Hale*, 3 Ves. 712, the court said it had gone too far in taking cases out of the statute; for a man having laid out a vast deal of money does not prove that he is to have a ninety-nine years' lease. The remedy ought to rest in compensation.

³ *Clarke v. Wright*, 2 Atk. 12; *Whitbread v. Brockhurst*, 1 Bro. C. C. 412;

Cooke v. Toombs, 2 Anst. 420; *Cooth v. Jackson*, 6 Ves. 12.

⁴ *Cole v. White*, 1 Bro. C. C. 409.

⁵ *Wills v. Stradling*, 3 Ves. 378.

⁶ *Alsopp v. Patten*, 1 Vern. 472; *Coles v. Trecothick*, 9 Ves. 284.

⁷ *Clinan v. Cook*, 1 Sch. & L. 22; *Butcher v. Butcher*, 9 Ves. 382.

⁸ *Forster v. Hale*, 3 Ves. 712.

⁹ *Mortimer v. Orchard*, 2 Ves. 243; *Boardman v. Mostyn*, 6 Ves. 470; *Allan v. Bower*, 3 Bro. C. C. 149.

¹⁰ *Ib.*; *Shannon v. Bradstreet*, 1 Sch. & L. 52.

¹¹ Thus Mass. Gen. Sts. c. 89, § 8; Vt. Comp. Sts. 1850, c. 67, § 3, South Carolina, and others.

in others leases exceeding a certain number of years are also required to be by deed.¹ And where the conveyance of freeholds is not required, by statute, to be under seal, this has, unless dispensed with, by statute, as in Alabama, Kentucky, and Louisiana,² been held requisite by common law.³ For this reason, an agreement, not under seal, that the lessor should not turn out the tenant so long as he paid rent, has been held invalid; because the tenancy created by it would not be determinable, so long as the tenant complied with the terms of the agreement, and would, therefore, operate as an estate for life, which can only pass by deed.⁴

§ 35. As to what is a sufficient signature to the agreement, required by the statute, it is held to be unnecessary that the writing should be contemporaneous with the making of the agreement; it is sufficient if made by the parties at one time and adopted afterwards; and then any thing under the hand of the party to be charged, amounting to an acknowledgment that he had entered into the agreement, will satisfy the statute. As where a person verbally agreed to take a lease for fifteen years, and it was subsequently made out and sent to him for signature; he returned it, and wrote on the back of the lease as follows: "I hereby request you to endeavor to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them; and for so doing this shall be a sufficient authority." Lord Ellenborough held that this was a clear recognition of an existing contract, sufficient to bind him.⁵ But the circumstance of a party altering the draft of a conveyance, and delivering it to the attorney to be engrossed, does not amount to signing it.⁶ Nor is the statute complied with, unless the agreement, though entirely written with

¹ Thus in Massachusetts, seven years, in Virginia five, in Florida two, in Delaware, Rhode Island, and Vermont, one year.

² Ala. Code, 1852, § 2193; Ky. R. S. 1852, c. 22, § 2; 4 Kent, Com. 443.

³ *Den v. Johnson*, 3 Green, N. J. 116, where it was contended, that, as by the statute of frauds all estates not in writing were at will, except certain short leases, all other transfers of interests in land whether for years or freehold, were by implication alike, and either freeholds were conveyable in writing or estates for years must be created by deed. But it was held, after elaborate consideration, that the statute was to be construed negatively and

not affirmatively, and merely substituted written for verbal transfers of land where these were allowed at common law, but did not alter other established modes of conveyance. So *Allen v. Jaquish*, 21 Wend. 628.

⁴ *Doe v. Browne*, 8 East, 165. By the English statute, 8 & 9 Vict. c. 106, all leases, required by law to be in writing, must be made by deed; and the same rule applies to assignments and surrenders of such leases.

⁵ *Shippey v. Derrison*, 5 Esp. 190; *Powell v. Dillon*, 2 Ball & B. 416.

⁶ *Hawkins v. Holmes*, 1 P. Wms. 770; *Lowther v. Carill*, 1 Vern. 221.

the party's own hand, be likewise signed by him, or something equivalent thereto be done; because the absence of a signature is evidence that the party considers the instrument to be incomplete.¹ But if he is in the habit of printing, instead of writing his name, he may be said to sign by his printed as well as by his written name.² And the name of the party may be put to the instrument by his direction, if in his presence, by the hand of another person.³ So if the agreement itself is not signed, but a letter alluding to, and acknowledging the agreement is signed, this has been held sufficient for the purposes of the statute.⁴ The contract should, of course, be signed by both parties, or it will be wholly void for want of mutuality.⁵

§ 36. At common law the place of signing is immaterial; for if a person writes his name in any part of the agreement, it will be considered his signature, if it was written for the purpose of giving authenticity to the instrument.⁶ Thus where a man drew up an agreement in his own handwriting, beginning, "I, A. B., agree," &c., and left a place for his signature, but did not sign it, the agreement was considered as sufficiently signed. For as a general rule wherever an agreement has been reduced to a certainty, and the statute has been substantially complied with, strict forms are not to be insisted on.⁷ Upon this principle it was held that the signing of an agreement in the place where a witness usually signs, by one who was acquainted with the contents, was sufficient.⁸ But the Revised Statutes of New York require that the name of the party shall be *subscribed* or signed below, or at the foot of the memorandum; what, therefore, under the old statute was deemed to be a sufficient signing, is not now a compliance with the statute of that State requiring a subscription.⁹ It was formerly doubted whether an agreement could be specifically enforced against a defendant who had signed it, when it was not signed by the party

¹ *Charlewood v. Bedford*, 1 Atk. 497; *Anderson v. Harold*, 10 Ohio, 399; *Bailey v. Ogden*, 3 Johns. 399.

² Per *Ld. Eldon*, in 2 B. & P. 239; *Schneider v. Norris*, 2 Maule & S. 286. And so if he writes it in pencil. *Merritt v. Clason*, 12 Johns. 102; s. c. 14 *id.* 484.

³ *Frost v. Deering*, 21 Me. 156.

⁴ *Sanderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *De Beil v. Thomson*, 3 Beav. 469. And the letter may be sent to the plaintiff, or the acknowledgment may be contained in a let-

ter sent to a third person. *Welford v. Beazeley*, 3 Atk. 503. And see *Dobell v. Hutchinson*, 3 Ad. & E. 355.

⁵ *Cammeyer v. The United Germ. Luth. Ch.* 2 Sandf. Ch. 186, 249; *Miller v. Pelletier*, 4 Edw. 102; citing 10 Paige, 386; 26 Wend. 341.

⁶ *Stokes v. Moore*, 1 Cox, 219; *Penniman v. Hartshorn*, 13 Mass. 87; *Knight v. Crockford*, 1 Esp. 490. See, also, *Bluck v. Gompertz*, 7 Exch. 862.

⁷ *Knight v. Crockford*, 1 Esp. 190.

⁸ *Welford v. Beazeley*, 3 Atk. 503.

⁹ *Davis v. Shields*, 26 Wend. 341.

seeking performance;¹ but it seems now to be well understood, that, wherever the obligation is mutual, it may not only be enforced in equity, but may also be the foundation of an action at law.²

SECTION III.

OF AN AGREEMENT FOR A LEASE.

§ 37. It sometimes becomes difficult to distinguish, in the form of a written instrument, between language importing an actual lease, and that which amounts to no more than an agreement for one. This distinction is nevertheless important to both parties, for it may happen, that what was intended by the one merely as an agreement for a lease may be construed into a lease, passing an estate in the land, and the other may thereby avoid covenants which would have been imposed upon him, if a regular lease had been executed. While its importance to the lessee appears from the fact, that, on the execution of an actual lease, he acquires an interest, — an *interesse termini*, — which, upon entry, vests the term in him; but, by an agreement only, he will acquire no legal interest in the term or in the land, nor can he set it up as a defence to an action of ejectment brought against him. Such an agreement, however, will operate as a license to enter upon the premises agreed to be demised; and if the intended landlord refuses to grant the lease, it gives the proposed tenant a right to file a bill in equity, to enforce a specific performance of the agreement, or to maintain an action for damages, if any damage has resulted from his refusal to perform the agreement.³ The difficulty of drawing the distinction between a present lease and a mere agreement to give a lease, has led to so much litigation in England, as to call for an Act of Parliament, providing that no lease in writing of any

¹ Per Ld. Redesdale, in *Lawrenson v. Butler*, 1 Sch. & L. 13.

² *Allen v. Bennet*, 3 Taunt. 176; *Bourke v. Rothwell*, 2 Ball & B. 66; *Martin v. Mitchell*, 2 Jac. & Walk. 427; *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Purmort*, 16 Wend. 460; *Penniman v. Harts-horn*, 13 Mass. 87.

³ *Price v. Williams*, 1 M. & W. 6. On the breach of an agreement to

give the plaintiff a lease of the premises, the expenses incurred by him, in preparing to remove to and occupy the premises, together with the difference between the real value of the lease and the contract price, may be recovered. *Ward v. Smith*, 11 Price, 19; *Driggs v. Dwight*, 17 Wend. 71; but not the profits which he might have made if he had obtained possession. *Giles v. O'Toole*, 4 Barb. 261.

freehold, copyhold, or leasehold land shall be valid as a lease, unless it be made by deed; but that any agreement in writing, to let such land, shall be valid, and take effect as an agreement to execute a lease; and that the person who may be in possession of land, in pursuance of an agreement to let, may, from payment of rent or other circumstances, be construed to be a tenant from year to year.¹

§ 38. As the law stands with us, the whole question resolves itself into one of construction; and an instrument is to be considered a lease, or only an agreement for a lease, according to what appears to be the paramount intention of the parties, as such intention may be collected from the whole tenor and effect of the instrument.² The law, it is said, will even do violence to the words, rather than break through the intent of the parties, by construing them into a lease, when the intention is manifestly otherwise.³ An express provision that an instrument is not to operate as a lease, but only as an agreement for one, shows clearly the intention of the parties, notwithstanding any inference which might be drawn from other clauses in the same instrument;⁴ but the mere use of the word *agreement* will not, of itself, make an instrument such, if the intention is manifestly otherwise.⁵

§ 39. Words of present demise, as *doth let*, *agrees to let*, *agrees to pay for*, *doth demise*, *shall enjoy*, or the like, will generally make an actual lease, particularly if no future or more formal document appears to be contemplated; and especially if possession is taken under it.⁶ But the use of such words, however strong, will

¹ Stat. 7 & 8 Vict. c. 76, § 4.

² *Goodtitle v. Way*, 1 T. R. 785; *Bacon v. Bowdoin*, 22 Pick. 401; *State v. Page*, 1 Spear, 408. An agreement containing words of bargain and sale *in presenti*, does not necessarily transfer the title, but may be a mere agreement to convey. *Jackson v. Myers*, 3 Johns. 888; *Jackson v. Clark*, *ib.* 424; *Ives v. Ives*, 18 *id.* 235; *Burnett v. Scribner*, 16 Barb. 621. And a contract reserving the right to quit at the end of ten years on paying first instalment, is a sale and not a lease. *Moulton v. Norton*, 5 Barb. 286.

³ *Hallett v. Wylie*, 3 Johns. 44; *Jackson v. Clark*, *ib.* 424; *Baxter v. Brown*, 2 W. Bl. 978.

⁴ *Perring v. Brooke*, 1 Mood. & R. 510.

⁵ *John v. Jenkins*, 3 Tyrw. 177; *Browne v. Warner*, 14 Ves. 156; *Weed v. Crocker*, 18 Gray, 219.

⁶ *Averill v. Taylor*, 8 N. Y. 44; *Baxter v. Brown*, 2 W. Bl. 978; *Wright v. Trevezant*, 8 C. & P. 441; *Doe v. Groves*, 15 East, 244; *Jenkins v. Eldridge*, 8 Story, 325. A sealed instrument not specifying any term, but purporting to demise and lease from a future day, the lessee to pay taxes for a year, and waive notice to quit, was held to be a lease for years. *Barney v. Keith*, 4 Wend. 502. An agreement of the purchaser of land, to allow the vendor to remain in possession for a year, and until the former should pay a certain mortgage, which, by its terms, had four years to run, was held to be a lease and not a reservation, and that the purchaser might pay, or tender the debt, within the year and remove the vendor under the statute. *Hunt v. Comstock*, 15 Wend. 665.

not constitute the instrument a lease, if it can be clearly inferred from the rest of the paper that the parties had it in contemplation to enter into a future lease.¹ Thus an instrument containing words of present demise, but in which was inserted an agreement, on the part of the owner, to make alterations and improvements, and by the other party to take a lease, when the premises should be so altered and improved, was held to be only an agreement for a lease.² So a paper containing words of present demise, with an agreement that the lessee *shall take possession immediately*, and that a lease shall be subsequently executed, operates only as an agreement for a lease.³

§ 40. Other illustrations of this principle are as follows: a man agreed that another should *enjoy the mills, &c.*, and engaged to give him a lease for a certain time and at a certain rent; and, by another part of the same agreement, an additional piece of land was to be purchased by the former and added to the land demised; it was held, that this amounted only to an agreement for a lease.⁴ An agreement in these words: "It is hereby agreed, by and between A. and B., that A. will let to B. the use of the county house in L.; and B. agrees to pay therefor the sum of \$750 annually, provided a majority of the county court will agree thereto," is only an agreement to lease on a precedent condition.⁵ So where the words of the agreement were, that A. *shall hold and enjoy*, and, in a subsequent part, the grantor engaged to give him a lease; the court held, that, although the words *shall enjoy* might constitute a present demise, yet they were qualified, by the subsequent engagement, into an agreement for a future lease.⁶ And a written authority from one to another to give a lease to a third person, on

¹ Jackson v. Moncrief, 5 Wend. 26; Tempest v. Rawling, 13 East, 18.

² Jackson v. Delacroix, 2 Wend. 433; Poole v. Bentley, 12 East, 168; Colley v. Streeton, 2 B. & C. 373.

³ Goodtitle v. Way, *supra*; Morgan v. Bissell, 3 Taunt. 65. Where the relation of the parties between the execution of the agreement, and the execution of the lease, cannot be any other than that of landlord and tenant, it is held to be a present demise. Curling v. Mills, 6 M. & G. 173. Though an agreement contains a stipulation for a future lease, and no precise day is fixed from which rent is to commence, still if it contains words of present demise, and the party is let into possession, it operates as a lease. Doe

v. Ries, 8 Bing. 178; Pearce v. Cheslyn, 4 Ad. & E. 225; Chapman v. Bluck, 4 Bing. N. C. 187.

⁴ Doe v. Ashburner, 5 T. R. 163; Dunk v. Hunter, 5 B. & A. 322; Clayton v. Burtenshaw, 5 B. & C. 41. A man agreed to repair a mill for another, for a certain sum to be paid when the work was finished, and the latter agreed to secure the premises to the former until the price was realized out of the profits. Held to be not a lease, but an agreement for a lease. People v. Gillis, 24 Wend. 201.

⁵ Buell v. Cook, 4 Conn. 238.

⁶ Doe v. Ashburner, 5 T. R. 163; Colley v. Streeton, 2 B. & C. 273; Phillips v. Hartley, 3 C. & P. 121.

terms previously offered in writing by such third person, is not in itself a lease.¹

§ 41. Where an instrument of this description has contained a clause, to the effect that it should be considered binding until a lease could be executed, it has been generally construed to be present lease. So the words, *A. hath and by these presents doth demise*, create a present interest; and a subsequent agreement, to give a more formal lease, contained in the same instrument, was held to be only in the nature of a covenant for further assurance.² And where the instrument was as follows: "A. agrees to let, and B. to take, for the term of sixty-one years; and, in consideration of a lease to be granted by A. for the said term, B. agrees to expend £2,000 in building, &c.; A. to grant a lease as soon as the houses are covered in; this agreement to be considered binding, until one fully prepared can be procured;" the court held it to be a lease, considering it to have been the intention of the parties that the tenant, who was to expend so much capital upon the premises, should have a present interest in the term, although, when a certain progress was made in the building, a more formal lease was to be executed, in which, perhaps, the premises might be more particularly described, for the convenience of underletting or assigning; and that the stipulation for a future lease did not, of itself, indicate an intention that the instrument should not operate as a present demise, but merely that a more formal instrument should thereafter be executed to effect the same thing, as being more satisfactory than the present instrument.³ But generally, if there are words of present demise, without any thing to indicate that the parties contemplate a further assurance, it will be considered a lease.⁴

§ 42. Certainty as to the time when the term is to commence, and as to its duration, and the amount of rent to be paid, is usually necessary to make an instrument operate as a present demise;⁵ while an uncertainty in these particulars will generally

¹ *Davis v. Thompson*, 1 Shep. 209.

² *Jackson v. Kisselbrach*, 10 Johns. 336; *Barry v. Nugent*, 5 T. R. 165; *Doe v. Benjamin*, 9 Ad. & E. 644; *Alderman v. Neate*, 4 M. & W. 704.

³ *Poole v. Bentley*, 12 East, 168; *Baxter v. Brown*, 2 W. Bl. 978; *Warman v. Faithfull*, 3 Nev. & M. 137; *Doe v. Groves*, 15 East, 244; *Pinero v. Judson*, 6 Bing. 206.

⁴ *Hallett v. Wylie*, 8 Johns. 44; *Thornton v. Payne*, 5 id. 74; *Mickie v. Law-*

rence, 5 Rand. 571; and see *Averill v. Taylor*, 8 N. Y. 44. An agreement to construct a wharf, which, when finished, is to be occupied by the grantee at a stipulated rent, accompanied by words of present demise, operates as a lease. *The People, &c. v. Kelsey*, 14 Abb. Pr. 372.

⁵ *Wright v. Trevezant*, 3 C. & P. 441; *Doe v. Ries*, 8 Bing. 178; *Warman v. Faithfull*, 3 Nev. & M. 137; *Dunk v. Hunter*, 5 B. & A. 322; *Clayton v. Burtenshaw*, 5 B. & C. 41; *John v. Jenkins*, 3 Tyrw. 170.

induce the courts to construe it as a mere agreement.¹ Thus where A. agreed "to let premises to B. on lease, with a purchasing clause, for twenty-one years, at £63 per year," B. to enter at any time on or before a particular day, it was held to amount to an agreement only, the court saying there were no words of demise, that the commencement of the tenancy was left uncertain, and that the words, as to purchasing, showed that the letting was to be by a particular instrument, containing such a clause.² The courts will sometimes, also, look at the contemporaneous acts of the parties, to assist in the construction of ambiguous words in such an agreement.³ For strong circumstances of inconvenience may indicate the intention of the parties to be, that it shall only amount to an agreement; as that a forfeiture will be incurred;⁴ or a stipulation, that out of the rent mentioned a proportionate abatement should be made, in respect of certain excepted premises, with a further stipulation, that the tenant shall hold *under all the usual covenants*, for it may be disputed what are usual covenants.⁵ Notwithstanding such a clause, however, an instrument may still be sufficiently certain to become a lease.⁶

§ 43. From a consideration of the cases, we may draw another rule applicable to this subject, that if an instrument, professing to be an agreement for a lease, is in itself a transfer of possession, whether immediate or *in futuro*, it is a lease, although it contains a stipulation for executing a subsequent lease. But if the words do not import immediate possession, or some act is to be done prior to the entry of the tenant, an inference will arise that the instrument was not intended for a lease, but only as an executory contract. Still, however, if the intention of the parties to create

¹ *Alderman v. Neate*, 4 M. & W. 704; *Doe v. Ries*, 8 Bing. 178; *Doe v. Benjamin*, 9 Ad. & E. 644.

² *Dunk v. Hunter*, 5 B. & A. 322. An agreement to let a house, for a given rent, to be paid part in advance, and security to be furnished for the residue, the term to commence at a future day, is conditioned on payment and security, and, if they are not tendered at the day, the landlord is at liberty to rescind. *McGaunten v. Wilbur*, 1 Cow. 257.

³ *Doe v. Ries*, 8 Bing. 181; *Chapman v. Bluck*, 4 Bing. N. C. 195. A lease for the term of five years reserved to the lessor the right to terminate the same by a six-months' notice of his intention to do so; but the lessor covenanted that the lessee should have the right to occupy, &c., for

the further term of five years from the thirtieth day after the decease of the lessor, and that he, the lessor, would make suitable provision, by will or otherwise, that this agreement shall be kept and performed by his legal representatives: it was held that the agreement for the further term was not a present demise, which would constitute an incumbrance upon the estate in the hands of a third person, after the first term had been surrendered by agreement. *Weld v. Traip*, 14 Gray. 330.

⁴ *Fenny v. Child*, 2 Maule & S. 255.

⁵ *Morgan v. Bissell*, 8 Taunt. 65; *Tempest v. Rawling*, 13 East, 18; *Doe v. Powell*, 8 Scott, N. R. 687, 700.

⁶ *Doe v. Benjamin*, 9 Ad. & E. 644; *Alderman v. Neate*, 4 M. & W. 704.

a lease is sufficiently explicit, it makes no difference whether the words run in the form of a license, a covenant, or an agreement.¹

§ 44. It is desirable that an agreement for a lease should contain a minute of all the covenants and conditions that are to be entered into by either party, in order to avoid disputes as to what covenants the landlord is entitled to claim. Thus, if it is intended that the tenant shall pay taxes or assessments, rebuild the premises in case of fire, or keep them insured, or that he shall not underlet or assign without the landlord's consent, it should be stipulated in the agreement, that proper clauses for such objects shall be contained in the lease; because these things cannot be insisted upon afterwards, unless they are expressly bargained for. No verbal explanations will be permitted to vary an agreement in writing; for all negotiations between the parties, prior to or contemporaneous with the execution of an instrument, are merged in it, and cannot be reconsidered.² If an agreement is silent as to what covenants are to be contained in the lease, and expresses only that it is to contain the *usual covenants*; it means only such as may be exacted, independent of positive stipulation, and such as are incident to the nature of the contract, and are therefore to be presumed to have been within the contemplation of both parties, in order to secure the full effect of the agreement. These words, however, are quite immaterial; for, in every such agreement, it is implied that there shall be usual and proper covenants.³

§ 45. What are to be deemed *usual covenants* will depend upon circumstances; often upon the custom, or usage in that respect, in the section of the country where the premises are situated; sometimes upon the nature of the property itself; and it seems to be properly a question of fact for a jury to determine, and not one of law.⁴ Thus it has been held, that a lessor could not, as a matter

¹ *Wilkinson v. Hall*, 8 Bing. N. C. 508; *Curling v. Mills*, 6 M. & G. 178.

² *Pattison v. Hull*, 9 Cow. 747; *Property v. Parker*, 3 Myl. & K. 280. An agreement signifies a mutual contract, on consideration, between two or more persons, and, *ex vi termini*, includes all the mutual stipulations of the respective parties. *Broadwell v. Getman*, 2 Den. 87. An agreement to give a conveyance is satisfied by a conveyance without warranty or covenant. *Van Eps v. The Mayor*, 12 Johns. 436; *Ketchum v. Evertson*, 13 *ib.* 359; *Fuller v. Hubbard*, 6 Cow. 13.

³ *Wilkins v. Fry*, 1 Mer. 263; *Garrard*

v. Grinling, 2 Swanst. 249. A contract for a lease, though in one case, in the Exchequer, it was held to embrace a covenant not to underlet or assign, — *Folkingham v. Croft*, 3 Anst. 700, — has repeatedly received a different construction in the Court of Chancery; *Church v. Brown*, 15 Ves. 264, 271; *Henderson v. Hayward*, 3 Bro. 632; while in other cases it has been considered a proper subject for reference and inquiry. *Jones v. Jones*, 12 Ves. 190; *Boardman v. Mostyn*, 6 Ves. 471.

⁴ *Bennett v. Womack*, 8 C. & P. 96. In this case there was a contract for an assignment of the lease of a public house,

of right, demand a covenant of the lessee not to assign or underlet without license;¹ or not to carry on a particular trade or business on the premises;² or to keep them insured, or to pay taxes.³ Nor on the other hand is it usual for a lessor to covenant to rebuild the demised premises in case of fire, with a stipulation that the rent shall cease on his failure to do so.⁴ But a covenant for the lessee's quiet enjoyment, without interruption by the lessor, or by persons claiming under him, is usual in all cases, and is in fact incidental to every lease.

§ 46. The mere signing of an agreement does not, as we have seen, establish the relation of landlord and tenant, although it creates a right of action for damages for a breach of the contract, or for a specific performance of it. And, although an agreement between an intended lessor and lessee may amount to a present demise, yet if, upon the face of it, a further instrument appears to be necessary to carry the intention of the parties into execution, equity will decree a specific performance of the agreement in that particular.⁵ But, to call this branch of equitable jurisprudence into operation, the terms and conditions of the intended lease must either be actually expressed, or fairly to be inferred; for, if any material portion of the terms be omitted or left in doubt, the court will regard the transaction as imperfect, and resting in treaty only.⁶ As where a tenant in possession proposed to pay an increased rent, a bill for a specific execution of the proposal was dismissed, because the period when the increased rent should commence was not agreed upon; and the same thing has been done in other cases, where no mention was made of the terms of the proposed lease.⁷ But where an agreement, uncertain in itself, refers to another written instrument, or to a plan forming part of the contract, parol evidence is admissible to identify the writing or the plan; though

which was described as holden at a certain net rent, upon usual and common covenants. The lease contained a covenant by the tenant, to pay land-tax, sewer's rate, and all other taxes, and a proviso for re-entry, if any business but that of a victualler should be carried on in the house. It was proved that a considerable majority of public-house leases contained such a proviso; and the court held, that the covenant was a common one in a lease reserving a net rent, and that the proviso was also usual and common.

¹ Church v. Brown, 15 Ves. 258.

² Van v. Corpe, 3 Myl. & K. 269; Propert v. Parker, *ib.* 280-282.

³ Bennett v. Womack, 7 B. & C. 627.

⁴ Doe v. Sandham, 1 T. R. 705; Medwin v. Sandham, 3 Swanst. 685.

⁵ Fenner v. Hepburn, 2 Y. & C. 159.

⁶ Gordon v. Trevelyan, 1 Price, 64; Verlander v. Codd, 1 Turn. & R. 352; 1 Younge & C. 82, 441.

⁷ Lord Ormond v. Anderson, 2 Ball & B. 363; Clinan v. Cooke, 1 Sch. & L. 22; O'Herlihy v. Hedges, *ib.* 128.

if such evidence be not clear and satisfactory, specific performance of such an agreement will be refused.¹

§ 47. In seeking the specific performance of an agreement, the plaintiff must not only make it appear that he is endeavoring to enforce a fair and reasonable contract, but must also show that his own conduct, in reference to it, has been fair, and free from suspicion; for if there be a reasonable doubt thrown upon the transaction, he will be left to his legal remedy for the non-performance of the contract.² Thus, where a party acted as if he had abandoned his contract to take a lease, his bill for specific performance was dismissed.³ Nor will an agreement to grant a lease be executed in favor of a tenant on evidence of his having been guilty of fraud, or felony; or on proof of his insolvency or commission of waste; or that there was a want of good husbandry, whilst holding under an agreement for a lease.⁴

§ 48. The court will not compel the acceptance of a lease, unless the party seeking the specific performance is able to perform the contract on his part, by granting a secure lease for the term agreed upon; and the offer of pecuniary compensation, in case of eviction, will not alter the case, because such indemnity cannot extend to the specific subject of the contract, which is the possession and occupation of the premises.⁵ But where a man contracts for the lease of an estate, when he is not entitled to part of it, the contract may be enforced by the lessee, as to the part of which the grantor is owner.⁶ An agreement, however, by a person out of possession, to grant a present lease to a party who is apprised that he cannot obtain possession of it except by a suit, will not be enforced; for it is a contract for a lawsuit, which is not a lawful subject of contract, and is not, therefore, a valid agreement for a lease.⁷

§ 49. As a general rule also, the specific performance of an agreement will only be ordered when it is in writing, and conforms to the statute in all other respects; but it may be decreed, although not in writing, where it is fully set forth in the bill and confessed by the answer;⁸ or where it has been partly carried into execu-

¹ *Hodges v. Horsfall*, 1 Russ. & M. 116; *Clinan v. Cooke*, 1 Sch. & L. 38.

² *Flood v. Finlay*, 2 Ball & B. 16; *O'Rourke v. Percival*, *ib.* 58; *Harris v. Kemble*, 1 Sim. 111.

³ *Garrett v. The Earl of Besborough*, 2 Dru. & Walsh, 441.

⁴ *Willingham v. Joyce*, 8 Ves. 168; *Brooke v. Hewitt*, *ib.* 253; *Buckland v.*

Hall, 8 *id.* 92; *Featherstonhaugh v. Fenwick*, 17 *id.* 818; *Pearson v. Knapp*, 1 Myl. & K. 312; *Hill v. Barclay*, 18 Ves. 68.

⁵ *Fildes v. Hooker*, 2 Mer. 424.

⁶ *O'Rourke v. Percival*, 2 Ball & B. 64.

⁷ *Bayly v. Tyrrell*, 2 Ball & B. 358.

⁸ *Attorney-General v. Sitwell*, 1 Younge & C. 583.

tion by the performance of such acts as clearly appear to have been done with a view to the agreement being fully performed, or under such circumstances as would manifestly operate as a fraud upon the other party unless the agreement should be fully performed.¹ And in all cases, a plaintiff is expected to exercise due diligence and activity in enforcing his claims; for an application of this kind, being addressed to the discretion of the court, will not be entertained in favor of a person who has long slept on his rights, or acquiesced in a title and possession adverse to his claim.² And whether the laches consisted in not prosecuting, or in not commencing a suit, is immaterial. But the doctrine of laches does not apply to a contract in part executed, by the party's having been in the enjoyment of the benefits given him by the contract.³

¹ *Ante*, §§ 33, 34. Although the subject of a specific performance of contracts is not strictly within the scope of this work, it may not be foreign to our purpose to observe incidentally, that, in general, a specific performance will not be enforced where accident or mistake would render it inequitable, *Schmidt v. Livingston*, 3 Edw. 213; *Clowes v. Higginson*, 1 Ves. & B. 524; or where the transaction is tainted with fraud, surprise, or misrepresentation, *Veeder v. Fonda*, 3 Paige, 94; *Faure v. Martin*, 7 N. Y. 210; *Best v. Stow*, 2 Sandf. Ch. 298; or may appear to be unreasonable or to work injustice, *Story Eq. Jur.* §§ 74, 769; *Mathews v. Terwilliger*, 3 Barb. 60; *Clarke v. Roch. R. R.* 18 Barb. 350. It is also stated in 5 Abb. N. Y. Dig. 63, that a party who seeks a specific performance in equity holds the affirmative, and must show, that the legal remedy is inadequate, and that, without a specific performance, injustice or irreparable injury will be done; that the contract is fair, just, and reasonable, equal in all its parts, founded on an adequate consideration, and free from fraud, misrepresentation, or surprise. Quoting *Fonbl. Eq.* 45-48, 281; 1 *Story Eq.* § 712; *Seymour v. Delancey*, 6 Johns.

Ch. 222; s. c. 3 *Cow.* 445; *Slocum v. Clossen*, 1 *How. Ap. Cas.* 705, 751.

² *Moore v. Blake*, 1 *Ball & B.* 62; *Hudson v. Bartram*, 3 *Madd.* 440; *Hertford v. Boore*, 5 *Ves.* 720.

³ *Clarke v. Moore*, 1 *Jones & La. T.* 723. If a person has agreed to execute a lease, or other deed, by a certain day, he is not in default until the party who is to receive it, being entitled thereto, has demanded it. In England, the party entitled to a deed is bound to have it drawn, and presented for execution; but our law has not gone so far. The party who is to give the deed should have it drawn at his own expense, execute it, and hold it ready for delivery when called for. The lessee may, of course, if he thinks proper, prepare the deed, and tender it for execution. *Carpenter v. Brown*, 6 *Barb.* 149, overruling the cases of *Connelly v. Pierce*, 7 *Wend.* 129; *Fuller v. Hubbard*, 6 *Cow.* 1. But a deed is not complete, nor is the grantee bound to accept it, unless it is in a condition to entitle it to be recorded, by having a proper clerk's certificate attached to it, where it is to be recorded in a county different from that where it was acknowledged. *Smith v. Smeltzer*, 1 *Hilt.* 287.

CHAPTER II.

OF THE DIFFERENT SPECIES OF TENANCY.

SECTION I.

LEASES FOR LIFE.

§ 50. WE have already noticed a material difference between leases for years and leases for a life or lives, in that the latter confer a freehold ; while the former, without respect to their periods of duration, amount to no more than a mere chattel interest.¹ More important distinctions are, that an estate for life cannot be made to commence *in futuro*, nor can it be created by parol ; while a tenant for life, or his representatives, has a right to the emblements, that is, to such annual products of the soil as do not mature during his term, and which he may remove after the determination of his tenancy. Other incidents of this estate, so far as they are applicable to our subject, and the various particulars by which the law distinguishes freehold interests from chattels real, will be noted from time to time as we proceed.

§ 51. An estate for life may be created, either by express limitation, or by a grant in general terms. For where a grant is made by tenant in fee to a man, or to a man *and his assigns* without any limitation in point of time, this will be considered to be an estate for life, and will continue for the life of the grantee only, and not for that of the grantor, or any other person.² A grant may also

¹ Estates for years, though still chattels real, are, for purposes of substantial justice, sometimes treated with more consideration than as mere terms ; and have been held to give a tenant an interest in land, enabling him to redeem the demised premises from a prior lien. *Averill v. Taylor*, 8 N. Y. 44.

² Co. Lit. 42 a. This provision of the

common law, is modified by 1 N. Y. R. S. 748, § 1. Every grant of land, or of any interest therein, shall pass all the estate or interest of the grantor, without the use of the words "heirs" or other words of inheritance ; unless the intent to pass an inferior estate or interest shall appear by express terms, or by necessary implication.

be made to one or more persons, to endure for their joint lives, or the life of the survivor, as well as for the life of a stranger; and when it is intended that a lease to two or more persons shall determine on the life of either, the grant should be for and during their joint lives. If the interest is to continue to the survivor, it is sufficient to grant it generally for their lives, without inserting words of survivorship; and on the death of either, the entire estate will survive to the other. But if the lease be granted for a certain term of years, *if the lessees shall so long live*, the interest will determine with the death of one.

§ 52. Where a grant is made, subject to be defeated by a particular event, provided there is no limitation in point of time, it will be *ab initio* a grant of an estate for life, as much as if no such event had been in contemplation. As if a grant be made to a man so long as he shall inhabit, or to a woman during her widowhood; as there is no certainty that the estate will be put an end to by the change of habitation, or by the marriage of the respective lessees, the estate is as perfect an estate for life, until such an event takes place, as if it had been granted absolutely.¹ And in a case where the plaintiff agreed to pay the defendant one hundred pounds per annum during the defendant's life, for which the plaintiff was to have the defendant's land and negroes, the court held it to be substantially a lease for the life of the defendant, and not a sale, as was contended.²

§ 53. Tenants for life may make under-leases, which will possess all the rights and privileges incident to the original estate; subject, of course, to be defeated by the death of the person upon whose life the first estate depends. And if the original estate determines by the death of the tenant for life, before the day of payment of rent from the under-tenant, the personal representatives of the tenant for life were not at common law entitled to recover any part of the rent accruing; but this has been altered by statute in England, and generally in this country, and the proportional part of the accruing rent may be recovered.³ The under-tenant is also entitled to emblements, and to the posses-

¹ Co. Lit. 42 a; Com. Landl. & T. 4. Woodard, 2 Wend. 487; Bloomer v. Waldron, 8 Hill, 361.

An estate for life, even if determinable when the rents shall have paid a debt to the lessee, is a freehold, which cannot be created without deed. *People v. Gillis*, 24 Wend. 201. A lease to a man, his executors, administrators, and assigns for ever, is a lease for life. *Williams v.*

² *Mickie v. Ex'rs of Wood*, 5 Rand. 574; *Newton v. Wilson*, 3 Hen. & M. 470; *Maverick v. Lewis*, 8 McCord, 211.

³ 1 N. Y. R. S. 747, § 22; 11 Geo. II. c. 19.

sion of the premises so far as it may be necessary to preserve and gather the crop.¹ But a tenant *pur auter vie* who continues in possession without the consent of the owner, after the determination of the life-estate, is at common law a tenant at sufferance, but by statute in New York has been declared a trespasser, and an action of ejectment will lie against him without any previous notice to quit.² A tenant for life is bound to pay all taxes, and the interest on all incumbrances on the land.³

SECTION II.

LEASES FOR YEARS, AND FROM YEAR TO YEAR.

§ 54. Leases may be granted, in express terms, for one or more years, or for any part of a year; and, in either case, the lessee will be treated as, and is usually called, a tenant for years. The ordinary mode of leasing is for a certain specified term of years; but if no particular period is limited for the duration of a tenancy, a tenancy from year to year may arise. This species of letting, where no certain time is mentioned, according to the strictness of the ancient law, continues during the pleasure of the parties only, and might have been put an end to at any time, by either party; the lessee, in such case, being called and in fact being, a tenant at will. But it was early determined, upon principles of justice and sound policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his pleasure contrary to equity and good faith. The lessor could not therefore determine the estate after the tenant had sown, and before he had reaped his crop, so as to prevent the necessary egress and regress to take away the emblements;⁴ nor could the tenant, before the period for the payment of rent arrived, determine the estate so as to deprive the landlord of his rent.⁵

§ 55. Since the time of the Year Books, however, "the courts have treated a general occupation as from year to year, whenever the reservation of rent or any other circumstances indicated an

¹ *Bevans v. Briscoe*, 4 Harr. & J. 189.

² *Livingston v. Tanner*, 14 N. Y. 64.

³ See *post*, § 318.

⁴ *Jackson v. Bradt*, 2 Caines Cas. 169; *Ellis v. Paige*, 2 Pick. 71 n.

⁵ *Kighly v. Bulkley*, 1 Sid. 838.

agreement for an annual holding," and such a tenant cannot be turned out of possession without reasonable notice to quit.¹ And such a tenancy is not now determinable, even at the end of the current year, unless a notice to quit has been previously served by the party, intending to dissolve the tenancy, upon the other; and, therefore, unless such notice is regularly given, a tenancy of this description will run on from year to year, until some event happens, which, in contemplation of law, will destroy it.² This rule applies to the tenant as well as to the landlord. Even if the tenant gives up the premises to an under-tenant, the landlord may still look to him for the rent of that year, unless the landlord accepts the incoming tenant; for, if he receives rent from the latter, he will be deemed to have made his election to accept him as the tenant.³

§ 56. A person, also, who holds merely as a tenant at will, or by sufferance, on payment of rent, "not expressly for a less term than a year," which is accepted as such by the owner, becomes a tenant from year to year; but without such payment, or an agreement to pay, and in the absence of any other circumstance denoting the intention of the parties to consider it otherwise, the tenancy at will continues to subsist.⁴ For where three persons entered

¹ Jackson v. Wilsey, 9 Johns. 267; in Massachusetts and Maine tenancies Lesley v. Randolph, 4 Rawle, 123; Thomas v. Wright, 9 S. & R. 87; Den v. Mackay, 1 Penningt. 420; Roe v. Lees, 2 W. Bl. 1171; Richardson v. Landgridge, 4 Taunt. 128, 131. Thus in Cattley v. Arnold, 1 Johns. & H. 651, 656, it is said, "As early as the reign of Hen. VIII., on any holding on which annual rent is reserved, the tenant is entitled to one half year's notice to quit." So per Buller, J., Right v. Darby, 1 T. R. 163; so Kerr v. Clark, 19 Mo. 132; Ridgeley v. Stillwell, 25 id. 570; Scully v. Murray, 84 id. 420; in Leavitt v. Leavitt, 47 N. H. 329, an agreement by tenant for life that remainder-man should occupy during his life and carry on farm, though not to pay rent, was held a tenancy from year to year. Mere occupation continued for many years, has been sometimes regarded as a tenancy from year to year, see Jackson v. Bryan, 1 Johns. 322; Den v. Mackay, 1 Penningt. 420. But the better doctrine seems to be, that the tenancy is only at will in the absence of other circumstances referring to an annual holding. Jones v. Willis, 8 Jones, N. C. 430; Williams v. Deriar, 31 Mo. 13. So Doe v. McKaeg, 10 B. & C. 721; Doe v. Jones, ib. 718; Doe v. Wood, 14 M. & W. 682. And

in Massachusetts and Maine tenancies from year to year are unknown. Ellis v. Paige, 1 Pick. 43; Withers v. Larrabee, 48 Me. 570.

² Right v. Darby, 1 T. R. 159; Clayton v. Blakey, 8 id. 3; Sullivan v. Cary, 17 Cal. 80; Witt v. New York, 5 Rob. N. Y. 248. In Oxley v. James, 13 M. & W. 214, Parke, B., says, "The nature of an estate from year to year" is "a lease for a year certain with a growing interest during every year thereafter, springing out of the original contract and parcel of it;" cited and approved Cattley v. Arnold, *supra*; where it is said, p. 656, "consequently the moment any new year begins the tenant has a right to hold to the end of that year." But whether the holding over the term is with intent to continue as tenant from year to year, is for the jury. Jones v. Shears, 4 Ad. & E. 832; Gray v. Bompas, 11 C. B. x. s. 520.

³ Levi v. Lewis, 6 C. B. x. s. 766; Ibbs v. Richardson, 9 Ad. & E. 849; Den v. McIntosh, 4 Ired. 291; Tomkins v. Lawrance, 8 C. & P. 729.

⁴ Rowan v. Lytle, 11 Wend. 619; Nichols v. Williams, 8 Cow. 13; Barlow v. Wainwright, 22 Vt. 88; Mann v. Lovejoy, Ry. & M. 355; Doe v. Weller, 7 T. R. 478;

under a lease for seven years, which was not signed by the lessor, and was therefore under the statute of frauds a mere tenancy at will, and payments of rent were made, which were, however, not shown to be with the assent of one of the three, who also had not resided a year on the premises, it was held that, as against her there was no evidence of a tenancy from year to year, for, to establish this, the agreement of all the parties must be shown.¹ In all cases, indeed, of occupancy under a parol lease for more than a year, though the lease is void under the statute for the specified term, if rent be paid, it will still enure as a tenancy from year to year.²

§ 57. But no tenancy from year to year is held to exist where the agreement stipulates for the payment of rent, and for occupation for a simple quarter or month only;³ or where the tenant holds over under a parol agreement limited to a single year.⁴ So though the agreed rent is annual if the tenant is expressly to hold at the lessor's will and pleasure.⁵ But though a tenancy from year to year differed originally from a tenancy at will only in respect of the right of the landlord and tenant respectively to a formal notice to quit,⁶ yet the absolute right to such a notice has made the former no longer at will, but a term subject to determination only by six months' notice expiring with the tenant's year.⁷ Thus it is not determined by death either of lessor or lessee,⁸ it is assignable and demisable,⁹ though only during its continuance,¹⁰ may be mortgaged,¹¹ and may be pleaded as a term.¹²

§ 58. Where the landlord suffers the tenant to remain in pos-

Cox v. Bent, 5 Bing. 185; *Lesley v. Randolph*, 4 Rawle, 123.

¹ *Doidge v. Bowers*, 2 M. & W. 365; *Denn v. Fearnside*, 1 Wils. 176; *Goodtitle v. Herbert*, 4 T. R. 680.

² *Schuyler v. Leggett*, 2 Cow. 660; *Shepherd v. Cummings*, 1 Coldw. Tenn. 354; *Lounsbery v. Snyder*, 81 N. Y. 514; *Greton v. Smith*, 33 N. Y. 245. A parol lease for four years, though void as to the term of years, is good for one year, if the lessee enters, and the tenancy thereafter becomes a tenancy from year to year. *People v. Rickert*, 8 Cow. 226; *Doe v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3. A lease, though void under the statute of frauds for want of written authority of the agent who executed it, may be referred to for the purpose of ascertaining and regulating the rights of the parties during the actual existence of the tenancy. *Porter v. Bleiler*, 17 Barb. 149.

³ *Wilkinson v. Hall*, 8 Bing. N. C. 508; *Blumenberg v. Myres*, 32 Cal. 93.

⁴ *Secor v. Pestana*, 37 Ill. 525.

⁵ *Doe v. Cox*, 11 Q. B. 122.

⁶ *Phillips v. Covert*, 7 Johns. 1; *Per Kent, C. J., Bradley v. Covel*, 4 Cow. 349. *Cattley v. Arnold*; *Oxley v. James*, *supra*.

⁷ *Maddon v. White*, 2 T. R. 159; *Doe v. Porter*, 8 *id.* 13; *Doe v. Wood*, 14 M. & W. 682; *Botheroyd v. Woolley*, 5 Tyrw. 522; *Cattley v. Arnold*, *supra*.

⁸ *Pleasant v. Benson*, 14 East, 234; *Mackay v. Mackeith*, 4 Doug. 213; *Cody v. Quarterman*, 12 Ga. 386; *Curtis v. Wheeler*, 1 Mood & M. 498; *Austin v. Thomson*, 45 N. H. 113.

⁹ *Pike v. Eyre*, 9 B. & C. 909.

¹⁰ *Burrowes v. Gradin*, 1 Dowl. & L. 213.

¹¹ *Howe v. Kensett*, 3 Ad. & E. 659; *Tomkins v. Lawrance*, 8 C. & P. 729; *Cattley v. Arnold*, *supra*. Hence a demise

session after the expiration of the original tenancy, lets in a tenant under a void lease, and receives rent, he thereby establishes a new tenancy from year to year, and the law presumes the holding to be upon the terms of the original demise, subject to the same rent, and to all the covenants contained in the original lease, so far as they are applicable to the new condition of things.¹ Thus, if there has been in the lease a covenant for particular modes of husbandry, and, after the expiration of the lease, the tenant holds over and pays rent, the landlord may compel him to perform all such covenants, in the same manner as if they were still expressly agreed to be continued between them.² And the tenant's liability will continue on the original lease, notwithstanding an undertaking on his part to pay a larger rent. As where he had covenanted to *repair and insure* in his lease, and, after the lease had run out, he agreed to pay a larger rent; the premises being accidentally burned down, the court held him bound to rebuild, and that the advance of rent made no difference, the terms of the old lease being in fact incorporated with the new contract.³ We have seen that it is not until after the payment and acceptance of rent (the term having expired), that the tenant becomes tenant from year to year; for, until then, a tenant holding over is strictly a tenant at sufferance.⁴

by a tenant from year to year, for a term of years, is no assignment; for by possibility his tenancy may outlast the term, and he has therefore a reversionary interest in which he may distrain. *Oxley v. James*, 18 M. & W. 209.

¹ *Salisbury v. Hale*, 12 Pick. 416; *Webber v. Shearman*, 8 Hill, 547; *Laguerrenne v. Dougherty*, 85 Pa. St. 45; *Lee v. Smith*, 9 Exch. 662; so *Finney v. St. Louis*, 39 Mo. 177, where a tenant entitled by the lease to improvements made by him was held still entitled while holding over. In *Despard v. Walbridge*, 15 N. Y. 374, the tenant being notified by lessor's assignee that if he held over he must pay an increased rent, was held to have assented thereto by merely continuing to occupy after his lease expired. So *Hunt v. Bailey*, 39 Mo. 267; *Adriance v. Hafkemeyer*, *ib.* 134; *Dorril v. Stephens*, 4 McCord, 59; *McKinney v. Peck*, 28 Ill. 174; *Bennett v. Ireland*, Ellis, B. & E. 326. But this principle was held not to apply where a tenant succeeded a prior tenant, and agreed for a certain rent, but paid only what the former tenant had paid; and lessor was allowed to recover the balance of rent agreed to be paid.

Mayor of Thetford v. Tyler, 8 Q. B. 95.

² *Roe v. Ward*, 1 H. Bl. 97; *Doe v. Amey* 12 Ad. & E. 476; *Hyatt v. Griffiths*, 17 Q. B. 505.

³ *Digby v. Atkinson*, 4 Camp. 275; 5 M. & W. 100. As to what is necessary to constitute a binding agreement for a larger rent, see *Hoff v. Baum*, 21 Cal. 120. It has been held that if a tenant holds over, he is bound to pay a proportionately increased rent for structures put on the premises by the landlord during the term. *Abeel v. Radcliff*, 15 Johns. 505. But this is doubted, *Holsman v. Abrams*, 2 Duer, 435. But no increase is allowed for structures built by tenant. *Newell v. Sanford*, 13 Iowa, 191; and where his former rent was not annual he may show the actual value of the premises. *Evertsen v. Sawyer*, 2 Wend. 507.

⁴ *Bishop v. Howard*, 2 B. & C. 100. In Louisiana, where a lessee continues in possession for a week after the expiration of his term, without opposition from the lessor, the lease will be presumed to continue at the same price, and on the same conditions, but for no particular period; and, under the Code, art. 2655, he will hold

SECTION III.

LEASES AT WILL.

§ 59. Leases at will may be created by express terms; or they may arise by implication of law. Formerly, all leases for uncertain periods were held to be tenancies at will merely. If a termor granted the land generally, the grantee was but a tenant at will; for, as it did not appear that the grantor meant to pass his whole interest, an estate at will was held to satisfy the grant.¹ But, in more modern times, the courts have evinced a disposition to construe tenancies of this description into tenancies from year to year;² and, in fact, the general language of the books now is, that the former species of tenancy cannot arise, without an express agreement to that effect.³

§ 60. Notwithstanding this disposition; however, tenancies at will do still subsist. But a distinction must be observed between a strict and a general tenancy at will. The former has only the rights of the ancient tenancy at will, being in fact little more than a license determinable by entry or demand, and does not create the relation of landlord and tenant, render the occupant liable in use and occupation, or entitle him to notice to quit. The latter confers the rights which tenancies at will later acquired, such as reasonable notice to quit; and the liabilities of tenants proper, such as for use and occupation. Thus a person who holds rent free by permission of the owner, or who enters under an agreement to purchase, or for a lease, but has not paid rent, or refuses to accept a lease, is strictly a tenant at will.⁴ So a parol gift of lands will create this species of tenancy.⁵ And if the agreement

by the month, and can only be expelled after fifteen days' notice; and can quit the premises only after giving a similar notice to the landlord. At any time within a week after the expiration of the lease, the tenant may be expelled without notice, or he may leave in like manner. *Bowles v. Lyon*, 6 Rob. La. 262. *Mossy v. Mead*, 2 La. 157.

¹ *Griffin's case*, 2 Leon. 78.

² *Doe v. Wood*, 14 M. & W. 682.

³ *Nichols v. Williams*, 8 Cow. 13; *Den v. McIntosh*, 4 Ired. 291; *Sullivan v. Enders*, 3 Dana, 66; *Timmins v. Rowlinson*, 3 Burr. 1609.

⁴ *Kirtland v. Pounsett*, 2 Taunt. 145;

Doe v. Stanion, 1 M. & W. 700; *Doe v. Miller*, 5 C. & P. 595; *Prop's &c. v. McFarland*, 12 Mass. 325; *Gould v. Thompson*, 4 Metc. 224; *Dunne v. Trustees*, 39 Ill. 578; per *Clarke, J.*, *Sarsfield v. Healey*, 50 Barb. 246; and see *ante*, § 25 and note. By statute in Massachusetts, Maine, New Hampshire, Vermont, and Ohio, all parol leases are at will; in the three last named States these may become tenancies from year to year; but in the two former these tenancies do not exist. *Ante*, § 55 and note.

⁵ *Jackson v. Rogers*, 1 Johns. Cas. 38; *Jackson v. Bradt*, 2 Caines Cas. 169.

be to let the premises so long as both parties choose, reserving a compensation to be paid daily, and not referable to a year, or to any aliquot parts of it, it does not create a holding from year to year, but a mere tenancy at will.¹ And where a party enters into the possession of premises under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes, by such refusal, a tenant *at will*, or rather by *sufferance*, for he may be ejected immediately.² But if the landlord subsequently accepts rent from him monthly, or according to the original agreement, a general tenancy at will is created, commencing from the time of entry.³ If a tenant, whose lease has expired, is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year, but so strictly at will, that he may be turned out of possession without notice;⁴ But while a man who enters under a void lease is strictly at will, if he pays rent he becomes a general tenant at will or from year to year, according to circumstances; although a notice to quit will always terminate this tenancy, or turn it into a tenancy from year to year.⁵ And if no certain term is agreed upon, or the tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period for its termination; and, in either case, is to be construed as a tenancy from year to year.⁶

§ 61. The reservation of a periodical rent is the principal criterion of distinction between tenancies from year to year and at will; and, in the absence of more direct evidence of the actual periods of reservation, the payment and acceptance of rent, at particular times of the year, are equivalent to an actual agreement to pay on those days, and are admissible to prove the nature of the tenancy.⁷ So an acknowledgment by a tenant of the existence of an arrearage, of half a year's rent, has been held admissible in evidence for the same purpose.⁸

§ 62. A strict tenancy at will may be determined by either party, at any time, subject to such statutory provisions as we shall pres-

¹ Richardson v. Langridge, 4 Taunt. 128.

² Denn v. Fearnside, 1 Wils. 176; Doe v. Watts, 7 T. R. 83; Bennett v. Ireland, Ellis, B. & E. 326. But see *ante*, § 57.

³ Anderson v. Prindle, 23 Wend. 616.

⁴ Jackson dem. Clinch v. Miller, 7 Cow. 747; Jackson v. Moncrief, 5 Wend. 26; Dubuque v. Miller, 11 Iowa, 688.

⁵ Bradley v. Covel, 4 Cow. 849.

⁶ Jackson v. Salmon, 4 Wend. 827; Webber v. Shearman, 8 Hill, 547; Ben-nock v. Whipple, 8 Fairf. 346; Finney v. St. Louis, 39 Mo. 177.

⁷ Knight v. Benett, 8 Bing. 361; Doe v. Stennett, 2 Esp. 718.

⁸ Cox v. Bent, 5 Bing. 185; and see, *ante*, § 58.

ently notice; but a general tenancy at will can only be determined by a notice to quit proportioned to the periods of the holding.¹ Thus if the rent is payable quarterly, and the lessor determines his will after the commencement of a new quarter, he will lose the rent that may be due for that quarter, and the lessee will be entitled to the emblements.² So if the lessee determines his will before the end of a quarter, he must pay the rent of the whole quarter in which the tenancy is determined.³ But any tenancy at will may be determined by implication of law: such implication arises on the death of either of the parties; acts of ownership exercised by the landlord, such as entering and cutting timber, making partition, or taking a distress for rent;⁴ or his alienation of the reversion.⁵ So if the tenant commits an act of voluntary waste, sells or transfers his interest to another, deserts the premises, or in any other way discontinues his lawful possession, he puts an end to this tenancy. For he has no certain, indefeasible estate, his relation to the landlord is entirely of a personal character, and he has consequently no interest which he can transfer to another, or over which he can exercise any control.⁶

§ 63. At common law, neither a tenant at will nor by sufferance was entitled to notice to quit before he could be ejected, although a demand of possession was always required. Yet even the words, "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to the fee, were held to be a sufficient determination of his will, and equivalent to a demand of possession, so as to maintain ejectment.⁷ And a tenant at will is even held to be a trespasser, by any unreasonable delay to remove, after

¹ Prickett v. Ritter, 16 Ill. 96.

² Leighton v. Theed, 1 Ld. Ray. 707. As to emblements, see, *post*, § 584.

³ Bowe's case, Aleyn, 4; Walker v. Furbish, 11 Cush. 366; Withers v. Larabee, 48 Me. 570. If a tenant at will, whose rent is payable quarterly, quit the premises on a quarter-day, without giving three months' previous notice of his intention, he will be liable, *prima facie*, for another quarter's rent; and, in an action to recover therefor, the burden of proof will be on him to show that the landlord had waived the notice, which would be a bar to the action, or that he had resumed the possession of the premises under an agreement which discharged the tenant from further liability for rent. Whitney

v. Gordon, 1 Cush. 266. As to length of notice, see *post*, § 478.

⁴ Rising v. Stannard, 17 Mass. 284; Doe v. Turner, 7 M. & W., 226; s. c. 9 *id.* 643; Reed v. Reed, 48 Me. 388; Adams v. McKesson, 53 Pa. St. 81.

⁵ Ball v. Cullimore, 5 Tyrw. 753; Ellis v. Paige, 1 Pick. 43; Kelly v. Waite, 12 Metc. 300; Pratt v. Farrar, 10 Allen, 519; Esty v. Baker, 50 Me. 325.

⁶ Philips v. Covert, 7 Johns. 1; Doak v. Donelson, 2 Yerg. 249; Warner v. Paige, 4 Vt. 291; Cooper v. Adams, 6 Cush. 87; Chandler v. Thurston, 10 Pick. 209; Daniels v. Pond, 21 Pick. 367.

⁷ Doe v. Price, 9 Bing. 356; Ellis v. Paige, 1 Pick. 47.

the estate has been determined.¹ But the Revised Statutes of New York, and the laws of most of the other States, now require formal notice to be given in either case, before a tenant can be proceeded against. We have seen that a vendee in possession is entitled to demand before ejectment is brought, although not to a formal notice to quit.² But where, in such a case, it was agreed that, if the purchaser did not pay the residue of the purchase-money on a certain day, he should forfeit the instalment already paid, and should not be entitled to an assignment of the lease, it was held to operate as a clause for re-entry, on a breach of covenant in the lease; and that the vendor might maintain ejectment, without either demand of possession or notice to quit.³

SECTION IV.

A TENANCY AT SUFFERANCE.

§ 64. A tenancy by sufferance arises when a man comes into possession lawfully, but holds over wrongfully, after the determination of his interest. He has only a naked possession, stands in no privity to the landlord, cannot maintain an action of trespass against him, and independent of the statute, is not entitled to notice to quit, nor is he liable to pay rent.⁴ For he holds by the laches of the landlord, who may enter and put an end to the tenancy whenever he pleases. But before entry, the landlord cannot maintain trespass against such a tenant, as he might against a stranger; for, being once in by lawful title, the law will suppose the *continuance* of a lawful possession unless the owner, by some public act, like entry, declares such continuance to be wrongful.⁵ If, however, he comes into the estate by act of law, and not by an

¹ *Ellis v. Paige*, *supra*; *Rising v. Stannard*, 17 Mass. 282; *Livingston v. Tanner*, 14 N. Y. 64.

² *Right v. Beard*, 18 East, 210. See *ante*, § 25, and note; *post*, §§ 470-472.

³ *Doe v. Sayer*, 8 Camp. 8; *Jones v. Chamberlaine*, 5 M. & W. 14.

⁴ But he is liable in use and occupation, *Harding v. Crethorn*, 1 Esp. 57; *Bayley v. Bradley*, 5 C. B. 896; *Christy v. Tancred*, 7 M. & W. 127; *IBBS v. Richardson*,

9 Ad. & E. 849. Though the opposite opinion was held in *Flood v. Flood*, 1 Allen, 217; *Delano v. Montague*, 4 Cush. 42.

⁵ Co. Lit. 270; *Jackson v. Parkhurst*, 5 Johns. 128; *Jackson v. McLeod*, 12 Johns. 182. A tenant at sufferance is not liable to the lessor in an action of trespass, before entry, or entitled to a notice to quit under the statute. *Keay v. Goodwin*, 16 Mass. 1; *Rising v. Stannard*, *supra*.

act of the party, he is not a tenant at sufferance, but is considered an intruder, *abator*, or trespasser.¹

§ 65. If a tenant for years surrenders his lease, and then holds over, he will be either a tenant by sufferance or a *disseisor*, at the election of the landlord.² So an under-tenant, who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is *quasi* a tenant at sufferance.³ A tenant at will, we have seen, acquires possession by the consent of the owner; and, if such consent can be inferred from any act of the landlord, a tenant at sufferance will become a tenant at will, or from year to year, according to circumstances.⁴ As in the case of a tenant for years holding over, if the lessor receives rent, or the lessee be permitted to continue on the land for a year, the tenancy by sufferance will be turned into a tenancy from year to year.⁵ But where a tenant holds over on the determination of an estate for years, or a person selling land agrees to deliver possession on a particular day, and afterwards refuses to do so, and continues in possession, he is, in either case, to be considered a tenant at sufferance.⁶

SECTION V.

DEMISE OF LODGINGS.

§ 66. There is also another species of tenancy, called lodgings, which occurs when only part of a tenement is let to another; and

¹ 2 Bl. Com. 150; Co. Lit. 57, b; 2 Inst. 134. Any one who continues in possession without agreement, after the termination of a particular estate, is a tenant at sufferance, and according to the New York statute, is entitled to a month's notice in writing before an ejectment can be brought for his removal. *Livingston v. Tanner*, 12 Barb. 481. At common law, the tenant was not entitled to notice to quit. He was regarded as holding over by wrong, having no estate, but a naked possession only, and standing in no privity to the landlord. Co. Lit. 57, b; 4 Kent, Com. 116; 4 Johns. 215. He was not liable for rent because it was the folly of the landlord to suffer him to continue in possession after the determination of the preceding estate; nor could the owner before entry maintain an action of trespass against such a tenant. The owner, however, could enter upon such a tenant, and dispossess him by force, and reap the crops, and

thus determine the tenancy. But these inconveniences have been obviated by the statutes of several of the States, in favor of this class of tenants, by requiring notice to quit, in all cases where the occupant is not by necessary implication, or by the statute, declared to be a trespasser.

² *Pennington v. Morse*, Dy. 61 b.

³ *Simkin v. Ashurst*, 4 Tyrw. 780.

⁴ *Rowan v. Lytle*, 11 Wend. 619.

⁵ *Doe v. Stennett*, 2 Esp. 717; and see *ante* § 55.

⁶ *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150; *Hollis v. Pool*, 3 Metc. 350; *Hildreth v. Conant*, 10 *id.* 298. After a sale of mortgaged premises by a mortgagee or his assigns, pursuant to a power of sale contained in the mortgage, the mortgagor, if he thereafter remains in possession, is a tenant at sufferance. *Kinsley v. Ames*, 2 Metc. 29; and see *Howard v. Merriam*, 5 Cush. 576.

this usually consists of furnished apartments. Being a contract for an interest in lands, it is within the statute of frauds, and must therefore be in writing, in all cases where the statute requires a lease to be in writing.¹ Thus, where the plaintiff had taken a house, partly furnished, at a certain rent, and the defendant agreed to send in all other necessary furniture within a reasonable time, it was held that the defendant's agreement to send in the furniture was an inseparable part of a contract for an interest in land, and ought, therefore, to have been in writing.² But a contract with the keeper of a hotel, or boarding-house, for board and lodging, although it may specify the payment of separate prices for each, and whether it be by the week, month, or year, creates no relation of landlord and tenant between the parties; for the lodger acquires no interest in the real estate, the contract being entire, for board and lodging.³

§ 67. Lodgers are entitled to all the privileges of tenants; and enjoy the same protection as to payment of rent and of notice to quit, determinable according to the terms of the letting. If a man takes lodgings on the first or second floors of a house, he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and the water-closet, unless it is otherwise stipulated at the time of taking lodgings; and, if the landlord deprives him of the use of either, an action lies.⁴ He is also, in general, subject to the same liabilities as other tenants; and is not justified in quitting his apartments without giving proper notice, even from a fear, however reasonable, that his goods may be seized for the landlord's rent.⁵ And with respect to his protection against legal process, it may be observed, that if a house is divided into several apartments, with an outer door to each apartment, and no communication subsists between them, the several apartments are to be considered in law as distinct mansion-houses; but if the owner lives in the house, all the untenanted apartments will be considered as parts of his house. In general, however, the question, what shall be deemed to be the mansion-house of the party, turns

¹ *Edge v. Stafford*, 1 Cr. & J. 391; *Inman v. Stamp*, 1 Stark. 12.

² *Mechelen v. Wallace*, 7 Ad. & E. 49.

³ *Wilson v. Martin*, 1 Den. 602. *Wright v. Stavert*, 2 Ellis & E. 721. But a lodging-house keeper is not responsible for the goods of the lodger. *Houlder v. Soulby*, 8

C. B. N. S. 254; *Dansey v. Richardson*, 3 Ellis & B. 144. As to the difference between a boarding-house and an inn, see *post*, § 419, note.

⁴ *Underwood v. Burrows*, 7 C. & P. 26.

⁵ *Rickett v. Tullick*, 6 C. & P. 66; *Griffith v. Hodges*, 1 *id.* 419.

upon the fact of there being an outer door or not. Thus, chambers in Inns of Court and in cottages, which have each of them an outer door that opens upon the common staircase, have been held, in cases of burglary, to be the houses of the respective occupants. But this privilege extends only to the purposes of personal protection for a man and his family; a bailiff, therefore, in the execution of mesne process, may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house.¹

¹ *Tracy v. Talbot*, 6 Mod. 214; 1 break the door of a tenant in a tenement-Hawk. P. C. 163, § 15; *Lee v. Gansel*, 1 house in order to attach the property of Cowp. 1. In *Swain v. Mizner*, 8 Gray, 182, a third person therein. it was held that an officer had no right to

CHAPTER III.

THE DURATION OF A TENANCY.

SECTION I.

THE COMMENCEMENT OF A LEASE.

§ 68. At common law, livery of seisin, or an actual manual tradition of the land, was necessary to complete every grant of an estate of inheritance, or for life only; although it was not required for the purposes of a lease for years, or other mere chattel interest. This distinction, however, has been abolished in most of the United States, and a simple delivery of the deed substituted in place of it; from which time, therefore, all grants, whether for life or years, now take effect. In leases for years, indeed, an actual entry is still necessary to vest the possession in the lessee; for the bare lease gives him, as we have seen, only a right to enter, or an *interesse termini*. When he enters in pursuance of that right, he is then, and not before, in possession of his term, and a complete tenant for years. But, in reference to the obligations of the parties, and regarding the lease as a contract, if the time from which it is to commence does not otherwise appear, it will be understood as commencing from the time the papers are dated; and, if not dated, then from the time they were delivered. If there are no writings, the tenancy will be governed by any express day fixed by the parties, except that the interest of the tenant will only begin upon entry; and if there is no day fixed by the parties, the tenancy commences only with the tenant's entry and not on any particular quarter-day.¹

§ 69. A receipt for rent, up to a particular day, is *prima facie* evidence of the commencement of a tenancy at or previous to that day. And, if a tenant enters in the middle of a quarter, and

¹ Church v. Gilman, 15 Wend. 656; Johns. 280; Kemp v. Derrett, 8 Camp. Co. Lit. 46 a; Jackson v. Bard, 4 510.

afterwards pays rent to the beginning of the succeeding regular quarter, from which time he pays half-yearly, his tenancy will be deemed to have commenced from the quarter-day to which he paid up.¹ But where a tenant, under a written lease, continues to hold over after the expiration of his tenancy, and assigns his interest to another, the new tenancy, if recognized by the landlord, will be held to have commenced at the time the original lease commenced, although the assignee came in on a different day.² Notice to quit on a particular day is no evidence of a holding from that day;³ and, when the premises contained in a demise consisted of a dwelling-house and other buildings, used for the purpose of carrying on a manufacture, a few acres of meadow and pasture lands, together with all watercourses, &c., which the tenant held under a written agreement for a lease, to commence, as to the meadow, from the 25th December then last past, as to the pasture ground from the 25th March then next, and as to the houses, mills, and all the rest of the premises from the 1st of May, the court held that the substantial time of entry was the 1st of May, because the principal subject of the demise was the house and buildings for the purpose of the manufacture, to which every thing else in the demise was merely auxiliary.⁴

§ 70. An estate for life needs no expression of the time at which it is to commence, because it cannot, at common law, commence *in futuro*, nor can its duration be ascertained; but it is of the very essence of a term of years to be fixed and determined; and, therefore, unless some certain beginning or event is referred to by which the period of its commencement may be ascertained, it will be void for uncertainty.⁵ But a lease, to commence or terminate on a contingency which must happen, is valid; for then its duration is made certain.⁶ Thus, a lease from the day of the lessor's death

¹ Doe v. Johnson, 6 Esp. 10.

² Per Ld. Ellenborough, in Doe v. Samuel, 5 Esp. 174.

³ Doe v. Forster, 13 East, 405.

⁴ Doe v. Watkins, 7 East, 551; Steele v. Mart, 4 B. & C. 272; Doe v. Benson, 4 B. & A. 588. A lease was dated Jan. 25, 1853, to run from the 1st day of April next, for and during and until the full end and term of five years, thence next ensuing, yielding and paying therefor unto the lessor the yearly rent of four thousand dollars in equal quarterly payments; to wit, on the first days of April, July, October, and Jan-

uary, in each and every year during the said term; and it was held that the term commenced on the first day of April, 1853, and included that day. Deyo v. Bleakley, 24 Barb. 9.

⁵ 1 Prest. on Est. 201; Bac. Abr. Leases (L.), 8. An agreement to convey seventy acres of land, without describing them or designating the place, is void for uncertainty; and a clause giving some clew to the identity of a small part only, does not help it. Rollin v. Pickett, 2 Hill, 552.

⁶ Goodright v. Richardson, 3 T. R.

until the 1st of May, 1629, was held to be good for so much of the term as remained after the lessor's death.¹ And there is no objection to a term of years commencing as of a day which is past; and, in that case, the lease takes effect, in point of computation, from that day, but in point of interest, from the delivery of the instrument.²

§ 71. As to an impossible or uncertain date, there appears to be a nice distinction taken in the books; that if a lease be made to begin from an impossible date, — as from the 30th day of February, — it takes effect from delivery. But where the limitation is uncertain, — as a lease made the 10th of October, to hold from the 20th day of November, without saying what November is meant, — the lease is void; because the limitation is part of the agreement, and the court cannot determine it, not knowing the terms of the contract.³ Yet, where a lease was dated 25th March, 1783, to hold from the 25th March now last past, and it was proved that the deed was not executed until some time after date, and rent was reserved from March 25th, 1783, it was held that the term commenced on the 25th March, 1783, and not on the 25th March, 1782;⁴ for, though there may appear to be no certainty of years in a lease, yet if, by reference to a certainty, it may be made certain, it is sufficient.⁵

§ 72. Leases may also be of perpetual duration; and these are usually in form a grant of the land in fee, reserving the payment of an annual rent, instead of a present consideration, and of this class the New York manor-leases, and the fee-farm leases in Pennsylvania, are specimens; or they may be leases to continue so long as the lessee shall continue to pay the rent, and perform the covenants contained in them. Thus, a demise to A. B., his heirs and assigns, for such a term of time as he pays rent, — he, on his part, covenanting for himself and his heirs to pay rent and perform covenants, — is a perpetual lease; and can only be terminated by the mutual agreement of the parties, or until the lessor shall elect,

462. The day fixed in the lease, on which the tenant is to have possession of the premises, is so much of the essence of the contract, that, if the lessor refuse to give the lessee possession on that day, the latter may abandon the contract. *Spencer v. Burton*, 5 Blackf. 57.

¹ *Child v. Baylie*, Cro. Jac. 459.

² *Moore v. Musgrave*, Hob. 18; *Enys v. Donnithorne*, 2 Burr. 1192.

³ *Bac. Abr. Leases (L.)*, 1. A lease from the — day of — 1866, for eighteen months, will be held to continue after July 1st, 1867. *Huffinan v. McDaniel*, 1 Oregon, 259.

⁴ *Steele v. Mart*; 4 B. & C. 272.

⁵ *Shep. Touch.* 272.

on default of the lessee to pay rent and perform the covenants, to consider it forfeited.¹

§ 73. When an estate for years is made to commence at a day to come, or on the happening of a particular event, it is, in either case, called, as we have said, an *interesse termini*, or a right to the possession of a term at a future time. Such a demise vests in the lessee a complete right to the possession of the premises, on the day fixed by the agreement for the commencement of the term; and, being a mere chattel interest, it was never required to be created by feoffment and livery of seisin.² But an estate for life, whether it lie in livery or in grant, cannot begin at a day to come, because the freehold may not be placed in abeyance.³ And, since no estate of freehold can commence *in futuro*, a lease to commence after the death of the lessor, or after the death of the lessee for life, is not good, unless there be some subsisting estate, which fills the intermediate space.⁴ If a term of years is granted in possession, and a second lease is made, to commence at the expiration of the existing lease, no reversion will pass by the second deed, nor will the second lessee be entitled to any interest under it, except a mere *interesse termini*, and the lessor will consequently be entitled to the rent reserved by the first lease, and may distrain for it as any other reversioner.⁵ But where a lease under seal is concurrent with the first lease it conveys the reversion, and not a mere *interesse termini*, and though no entry is made under it, the right to distrain for rent follows.⁶

SECTION II.

THE TERMINATION OF A LEASE.

§ 74. Terms were originally of short duration; and Lord Coke states, that, by the ancient law of England, they could not exceed

¹ *Folts v. Huntley*, 7 Wend. 210; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Wallace v. Harmstad*, 44 Pa. St. 492; *Phila. Lib. Co. v. Beaumont*, 89 *id.* 43. So a lease "as long as water runs, or grass grows," is good as a perpetual lease. *White v. Fuller*, 38 Vt. 193.

² *Winter v. Loveday*, 1 Comyn, 39.

³ 1 Prest. on Est. 117; 2 Bl. Com. 314; *Singleton v. Bremar*, 4 McCord, 12.

⁴ 1 Prest. on Est. 231; *Weale v. Lower*, Pollexf. 55.

⁵ *Smith v. Day*, 2 M. & W. 684. So

where lessee held over, the original lessor, and not one to whom he had granted a lease and who was entitled to an *interesse termini*, recovered the double rent given by statute. *Blatchford v. Cole*, 5 C. B. n. s. 514; so surrender to produce merger must be made to the lessor, not to the owner of *interesse termini*. *Edwards v. Wickwar*, 35 Law J. n. s. 309.

⁶ *Colbourne v. Mixstone*, 1 Leon. 129. Affirmed, *Doe v. Rawlins*, 5 B. & C. 121; *Harmer v. Bean*, 3 Carr. & K. 307.

an ordinary generation of forty years, for the reason, that, if leases could be made for a longer period, men might be disinherited. This doctrine of the common law, however, had become antiquated even in his day, and was soon after abolished altogether.¹ There is now no limitation to the extent of a term of years, either in England or the United States, except in the State of New York, in reference to a particular species of lease; the constitution of that State, which was adopted in 1846, providing that no future lease of lands, for agricultural purposes, shall be valid for a longer period than twelve years.

§ 75. The continuance of a term of years constitutes an essential part of the contract, and must be ascertained with certainty; otherwise, the lease will create but a tenancy at will or from year to year, if it be not wholly void. As if it be to hold until a child, then unborn, shall be of full age; or so long as a certain individual shall continue parson of Dale; this will, in either case, constitute but a tenancy at will, because of the uncertainty that the child will ever arrive at that age, or that the individual in question will continue parson of Dale.² The duration of a lease may, however, be defined, either by an express enumeration of years, or by reference to a certainty; or it may be reduced to a certainty by matter *ex post facto*. Thus, if it is intended to grant a term for years, so as to be dependent for its continuance upon the duration of a life, it must be granted for a stated term of years, if the life shall so long continue; as for the term of ninety-nine years, if a certain person shall live so long; for there the utmost limit of the term is marked out, subject to a sooner determination on a collateral event. And though anciently otherwise, on the ground that there could be no remainder of a term after a life-estate therein, it was settled that the unexpired residue of the term, taken in the sense of time, might be limited over on decease of the life-tenant. But it may be granted to a man for life, and a subsequent lease may be granted to another for sixty years, to commence after the decease of the first, or to commence immediately and run in computation of time concurrently with the first term; subject to postponement, as to possession, until the decease of the first person.³ A grant for the life of one not in existence is void; but if for the lives of A., B.,

¹ Co. Lit. 45, b; 46, a; Theobalds v. Duffoy, 9 Mod. 101.

² Bishop of Bath's case, 6 Co. 85.

³ Shep. Touch. 274; Wright v. Cartwright, 1 Burr. 282; Rector of Chedington's case, 1 Co. 155, a.

and C., and there should be no such person as C., it is good for the lives of A. and B.¹

§ 76. The duration of a lease may, as we have said, be defined with reference to a certainty; as, for instance, to another lease already in existence, as a lease to A., for so many years as B. has in the manor of Dale; here if B. has ten years' interest in that manor, A. will take a term of the same extent. But when a reference of this kind is made, it must be to a thing which has express certainty at the time the lease is made, and not to a mere possibility or casual certainty. As in the case above referred to, where a lease is made for so many years as a man shall continue parson of Dale, this cannot be made certain, for nothing can be less certain than the time of his death, or the period of his ceasing to be parson.² And a lease which does not fix the exact period at which the tenancy is to end, may yet be sufficient for a particular time in it which is certain.³ So a term may be demised subject to a contingent sooner determination by a collateral event, as by the exercise of eminent domain,⁴ or the lessor's selling;⁵ or any condition.⁶

§ 77. A term may also be rendered certain by matter *ex post facto*. Thus it may be granted for so many years as A. B. shall name; and the lease, though uncertain at the beginning, will be valid *ab initio*, after the naming of the years.⁷ A demise, "not for one year only, but from year to year," constitutes a tenancy for two years, at least, and is not determinable by a notice to quit at the expiration of the first year.⁸ Or if a man make a lease for years, without saying how many, it is good for two years; for more than this there is no certainty, and for less there can be no sense in the words.⁹ In the city of New York, if no time is agreed upon as to its duration, it is a lease to continue until the first day of May next after possession under such agreement shall commence; and the rent under it is payable at the usual quarter-days for the payment of rent in that city, unless otherwise expressed in the agree-

¹ Doe v. Edwards, 1 M. & W. 553. Particular care should be observed in the use of the particles *and* and *or*; for a lease for ninety-nine years, if A. and B. so long live, is determinable by the death of either A. or B.; but a lease, if A. or B. so long live, lasts till the death of the survivor of them. Lord Vaux's case, Cro. El. 269; Elliott v. Turner, 2 C. B. 461.

² Bishop of Bath's case, *ante*; 6 Co. 84, b; Co. Lit. 45, b.

³ Gwynne v. Mainstone, 3 C. & P. 802.

⁴ Munigle v. Boston, 8 Allen, 230.

⁵ Knowles v. Hull, 97 Mass. 206.

⁶ Ashley v. Warner, 11 Gray, 43.

⁷ Goodright v. Richardson, 3 T. R. 463.

⁸ Denn v. Cartright, 4 East, 29.

⁹ Bac. Abr. Leases (L.), 8.

ment.¹ If a lease is made for a month or months, by the law in this country calendar months are usually intended.² But, by the English law, a month means a lunar month of twenty-eight days, or four weeks; and a lease for twelve months has therefore been held to be for forty-eight weeks only.³

§ 78. It was anciently held, following strictly the words employed, that a lease "from the day of the date," excluded, and "from the date," included the first day, in point of computation,⁴ or as the rule is sometimes stated, that on computation "from" a day, that day is excluded, but "from" an act, the day of the act is included.⁵ The strict construction in the first of these rules was qualified in later cases, and the day was included whenever its exclusion would have produced a forfeiture or estoppel, or defeated the clear intention of the parties apparent from the instrument,⁶ or where local custom controls.⁷ But if no such reasons existed the day was excluded,⁸ and the general rule laid down that one terminus should be excluded and the other included in computation of time.⁹

¹ 1 R. S. 744, § 1.

² 1 N. Y. R. S. 606, § 4; 1 Hill. Abr. 118, n; *Avery v. Pixley*, 4 Mass. 460; *Hardin v. Major*, 4 Bibb. 105; *Gross v. Fowler*, 21 Cal. 392; *Strong v. Birchard*, 5 Conn. 361; *Brewer v. Harris*, 5 Gratt. 298; *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 177.

³ 2 Bl. Com. 141; 6 T. R. 224; *Stackhouse v. Halsey*, 3 Johns. Ch. 74; *Parsons v. Chamberlin*, 4 Wend. 512; *The People v. The Mayor*, 10 id. 398; *Simpson v. Margitson* 11 Q. B. 23; *Rogers v. Kingston on Hull Dock Co.* 4 New R. (V. C.) 494. A distinction has been held between twelve months and a twelvemonth, and the latter has been held to mean a year. *Catesby's case*, 6 Co. R. 61. Calendar months agree with those of the Gregorian calendar, or the twelve well-known months of the year; but lunar months, as stated in the text, consist of twenty-eight days only. The latter computation was used by the Greeks and Romans, and was probably introduced into the common law of England from the codes of those countries.

⁴ *Clayton's case*, 5 Co. 1; *Hatter v. Ash*, 1 Ld. Ray. 84; Co. Lit. 46, b.; the word *datus* signifying delivery; but *datus* or date now means day. *Styles v. Wardle*, 4 B. & C. 908; *Johnson v. Stewart*, 11 Gray, 181. A lease may commence from one date in point of interest, and another in point of computation. *Enys v. Donni-thorne*, 2 Burr. 1190. So see *Crusoe v. Bughy*, 8 Wils. 284. In this case the term

only begins when the interest vests. Thus where the lease was to cease if any accident occurred during the term, and the lease was to commence June, 1851, but was not actually executed until Nov., 1852, an accident which occurred in Sept., 1851, was held not within the term. *Jervis v. Tomkinson*, 1 Hurlst. & N. 195.

⁵ *Blake v. Crowninshield*, 9 N. H. 804; *Ewing v. Bailey*, 4 Scam. 420.

⁶ *Pugh v. Duke of Leeds*, Cowp. 714; *Lester v. Garland*, 15 Ves. 248; *Windsor v. China*, 4 Greenl. 298; *Sims v. Hampton*, 1 S. & R. 411; *Bennet v. Nichols*, 4 T. R. 121; *Wilkinson v. Gaston*, 9 Q. B. 187; *Pellew v. Wonford*, 9 B. & C. 184; *Sands v. Lyon*, 18 Conn. 80; *People v. Robertson*, 89 Barb. 9.

⁷ Thus in New York, *Wilcox v. Wood*, 9 Wend. 346; Connecticut: *Fox v. Nathans*, 32 Conn. 348; Pennsylvania: *Marys v. Anderson*, 24 Pa. St. 272.

⁸ *Bigelow v. Willson*, 1 Pick. 485; *Wigin v. Peters*, 1 Metc. 127; *Atkins v. Sleeper*, 7 Allen, 487; *Rand v. Rand*, 4 N. H. 267, 276; *Styles v. Wardle*, 4 B. & C. 908; *Pellew v. Wonford*, 9 id. 184; *Ackland v. Lutley*, 9 Ad. & E. 879; *Webb v. Fairmaner*, 8 M. & W. 478; *Gorst v. Lowndes*, 11 Sim. 434.

⁹ *Farwell v. Rogers*, 4 Cush. 460; *Cornell v. Moulton*, 8 Denio, 12; *Judd v. Fulton*, 10 Barb. 117; *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 190. The distinction has sometimes been attempted that where an

§ 79. The second of these rules has not been so generally followed. It seems to be the law in England,¹ in the United States courts,² and several of the State courts.³ In other States it is rejected,⁴ while in others the decisions conflict.⁵ Where the words of computation refer to the end of the period, this will be included or excluded according to the rules just laid down.⁶

§ 80. Though a lease by parol may be void, as exceeding the period allowed by the statute of frauds, and the tenancy will, according to circumstances, be construed at will, or from year to year, it will nevertheless be governed as to its termination, as well as its other incidents, by the terms of the demise, and will expire at the time limited, without notice to quit,⁷ or it may be determined under a proviso for re-entry implied from that or the original lease.⁸

§ 81. If the duration is left optional by the terms of the lease, without saying at whose option, — as, for instance, if a lease be made for seven, fourteen, or twenty-one years, — it means at the option of the tenant, who has the right of choosing whether he will put an end to the lease at the end of seven years, or continue it for fourteen or twenty-one years.⁹ And in all cases of uncertainty, the tenant is most favored by law, because the landlord, having the power of providing expressly in his own favor, has neglected to do so; and on the principle, also, that every man's grant shall be taken most strongly against himself.¹⁰

§ 82. It was formerly held that the effect of a lease "from year to year, so long as both parties please," was, to create a tenancy

interest is to pass, the day of the date is included; 4 Kent, Com. 95, note a; *Lysle v. Williams*, 15 S. & R. 185; *Donaldson v. Smith*, 1 Ashm. 197; but this was denied in *Farwell v. Rogers*, 4 Cush. 460; is *contra* to every case of demise where the first day has been excluded, see cases *supra*; and is an injury to lessee, as it deprives him of one day.

¹ *Rex v. Adderley*, Doug. 463; *Castle v. Burditt*, 3 T. R. 623; *Glassington v. Rawlins*, 3 East, 407.

² *Arnold v. United States*, 9 Cranch, 104; *Pearpoint v. Graham*, 4 Wash. C. C. 232.

³ Thus *New Hampshire*, *Blake v. Crowninshield*, 9 N. H. 304; *Indiana*: *Jacobs v. Graham*, 1 Blackf. 392; *Illinois*: *Ewing v. Bailey*, 4 Scam. 420; *Pennsylvania*: *Thomas v. Afflick*, 16 Pa. St. 14; *Kentucky*: *Batman v. Megowan*, 1 Metc. Ky. 533.

⁴ *Connecticut*, *Sands v. Lyon*, 18 Conn. 18; *Weeks v. Hull*, 19 *id.* 876; *New York*:

People v. N.Y. Centr. R. R. 28 Barb. 234.

⁵ Thus in *Massachusetts*, it is denied in *Bigelow v. Willson*, 1 Pick. 485; *Fuller v. Russell*, 6 Gray, 128; but *Butler v. Fessenden*, 12 Cush. 78, is *contra*.

⁶ *Small v. Edrick*, 6 Wend. 187; *Wiggin v. Peters*, 1 Metc. 127.

⁷ *Berry v. Lindley*, 3 M. & G. 514; *Doe v. Moffatt*, 15 Q. B. 257; *Doe v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 Ellis & B. 86; *Creech v. Crockett*, 5 Cush. 133; *Elliott v. Stone*, 1 Gray, 574.

⁸ *Thomas v. Packer*, 1 Hurlst. & N. 669; *Hayne v. Cumming*, 16 C. B. n. s. 421.

⁹ *Dann v. Spurrier*, 3 B. & P. 399; *Goodright v. Richardson*, 3 T. R. 462; *Doe v. Dixon*, 9 East, 15; *Goodright v. Mark*, 4 Maule & S. 30; *Fallon v. Robins*, 16 Ir. Eq. 422; but where determinable "if both parties think fit," both must concur. *Fowell v. Tranter*, 18 W. R. 145.

¹⁰ *Doe v. Dixon*, 9 East, 15; *Folts v. Huntley*, 7 Wend. 214.

for at least two years;¹ but this case was recently overruled in the Court of Queen's Bench, by a decision that a tenancy from year to year lasts only so long as both parties please, and that it is determinable by either party, at the end of the first or any other year, by giving the usual notice to quit at the end of that year; unless, in the creation of such a tenancy, the parties should introduce provisions showing that they contemplated a tenancy for at least two years.² But where the words were, "for one year from the date hereof, and so on from year to year, until the tenancy hereby created shall be determined, as after mentioned," with a subsequent proviso that it should be lawful for either party to determine the tenancy, by giving three months' notice to the other; it was held that the tenancy was not determinable by a notice expiring before the end of the second year, for the court considered the language of the contract clearly contemplated a term to continue longer than one year.³ Where a lease is made determinable before its regular expiration, at the option of the lessee, on giving six months' notice, it is advisable for the lessor to make that option conditional, upon payment of rent due to the period of determination, and the performance of the lessee's covenants; for this being a condition precedent the tenant may thereby be prevented from putting an end to the lease, leaving the charges upon the property unpaid, and the premises in a dilapidated state.⁴

§ 83. As a general rule, a deed which will not convey all that is intended, will be construed to convey all that it was in the power of the grantor to convey.⁵ And our law may be considered as extending the English rule, which held that if a man has power to lease for ten years, and he leases for twenty, the lease is bad at law, but good in equity for the ten years, operating as an execution of a power.⁶ So a devise of lands to an executor, for the payment of the debts of the testator, or until his debts are paid, or a particular sum is raised, will create an estate for so many years only as are necessary to raise the required sum.⁷ But no

Good v. Bate

¹ *Agard v. King*, Cro. EL. 775; *Birch v. Wright*, 1 T. R. 380.

² *Doe v. Smaridge*, 7 Q. B. 957; *Fox v. Nathans*, 82 Conn. 348; *Doe v. Mainby*, 10 Q. B. 478.

³ *Doe v. Green*, 9 Ad. & E. 658; *Regina v. Chawton*, 1 Q. B. 247. So *Wharton v. Kelly*, 14 Irish Com. L. 293, where the premises were let "for one year certain," and rent quarterly in "each

and every year during the tenancy," with certain allowances "during the first four quarters."

⁴ *Porter v. Shephard*, 6 T. R. 665.

⁵ *Law v. Hempstead*, 10 Conn. R. 28; *Martin v. Sterling*, 1 Root, 210.

⁶ *Roe v. Prideaux*, 10 East, 158; *Taylor v. Horde*, 1 Burr. 120.

⁷ *Corbet's case*, 4 Co. 81, b; *Carter v. Barnardiston*, 1 P. Wms. 509-518.

man may grant a lease to continue beyond the period at which his own estate is to determine ; therefore a tenant for life cannot make a lease to continue after his death.¹ Yet a lease made under a power, may continue, notwithstanding the determination of the estate, by the death of the person by whom the power is to be exercised.² And in all such cases, although the demise may be void as a lease for years, it will still operate as a lease at will, or from year to year, and the instrument may be given in evidence, as proof of the amount of rent to be paid, and of the other terms on which the lands are held.

¹ *Robie v. Smith*, 21 Me. 114.

² 2 Rol. Abr. 261, pl. 10; Co. Lit. 219.

CHAPTER IV.

THE CONTRACTING PARTIES.

§ 84. ALL persons seised or possessed of lands or tenements may grant leases thereof for any period commensurate with their respective interests; except such only as are under some legal disability, and whom the law supposes incapable of entering into any contract. The Revised Statutes of New York declare, that "every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise, or purchase." And, "every person capable of holding lands (except idiots, persons of unsound mind, and infants), seised of or entitled to any estate or interests in lands, may alien such estate or interest at his pleasure, with the effect, and subject to the restrictions and regulations provided by law."¹ At common law as well as by statute, there is also this further qualification to be observed, that every grant of land is void, if, at the time of its delivery, the land shall be in the actual possession of a person claiming under a title adverse to that of the grantor; although if a lessor is in possession at the time of making a lease, he will be deemed to have the right of possession, as to all persons holding under him; without such possession, however, he cannot make a valid lease, for a bare right of entry is but a chose in action, and is not assignable.² But if he has actual possession, though obtained tortiously, — a mere disseisor, — it will enable him to make a lease, which can only be avoided, upon eviction, by one having a paramount title.³

§ 85. Possession is of so much importance to the validity of a

¹ R. S. 719, §§ 8, 10; *ib.* 789, § 147.

² *Iseham v. Morrice*, Cro. Car. 109. To constitute an adverse possession, it must be under a claim of some specific title. *Crary v. Goodman*, 22 N. Y. 170. And where an occupant of land produces no written title, but relies solely on possession, with an assertion of title, he can retain only so much as he had under actual improvement, and within a substantial enclosure. *Jackson v. Warford*, 7 Wend. 62; *Munro v. Merchant*, 26 Barb. 383, 404; *Sherry v. Frecking*, 4 Duer, 452. By the statute of frauds, a parol gift of land in fee creates only a tenancy at will; and,

if the donee makes a lease, it is void, and cannot be rendered valid by any subsequent assent of the donor. *Jackson v. Rogers*, 1 Johns. Cas. 33; *Doe v. Watts*, 7 T. R. 85; *Jenkins v. Church*, Cowp. 482; *Doe v. Butcher*, Doug. 50.

³ *Bac. Abr. Leases* (I.), 4; *Lee v. Norris*, Cro. El. 331; *Thurston's case*, Owen, 16; *Mayowe's Case*, 1 Co. 147 (a). Possession is the detention or enjoyment of a thing, which a man holds or exercises by himself or by another who keeps or exercises it in his name, and the enjoyment is necessarily exclusive. *Redfield v. Utica & S.R.R.* 25 Barb. 54. A disseisin is an estate

lease, that if a disseisee wishes to make a lease of land of which he is disseised, he can only deliver it as an escrow, to take effect after he enters or recovers possession. His deed will not operate before entry, further than to transfer the lessor's right of entry, to take effect after his entry.¹ But this rule applies only to the original parties, for a lessee for years, as having an *interesse termini*, may make a lease of part, or an assignment of the whole of his term, before he enters on the demised premises.² And if a man dies, and his heir makes a lease of the land descended to him before entry, this is a good lease, for he is seised in law, though not in fact. But if a stranger had entered, and abated into the land, and then the heir had made the lease, it would have been bad, for it would have been after a disseisin.³ The possession of a tenant for life, however, is not adverse to that of the remainder-man, and hence the latter may make a valid lease, notwithstanding such possession.⁴

§ 86. Possession will be considered as following the ownership, unless there is an adverse possession. And, where there has once been an actual seisin, it will be presumed to continue, although the premises may appear to be vacant.⁵ At common law no interest in land could pass from a vendor, before he had himself obtained possession, by livery of seisin; but by force of the statute of uses, the possession was transferred in all cases to the use of the *cestui que use*, who may now, therefore, if there is no adverse possession, make a lease for years, without actual entry.⁶ And, if

gained by wrong and injury; and therein differs from a dispossession, which may be right or wrong. A mere entry upon another is not a disseisin unless it is accompanied with expulsion from the freehold; and a peaceable entry, upon land apparently vacant, furnishes, *per se*, no presumption of wrong. *Smith v. Burtis*, 6 Johns. 197; *Varick v. Jackson*, 2 Wend. 166; Co. Lit. 8 b; 18 b.

¹ *Doe v. Watts*, 9 East, 19; *Jennings v. Bragg*, Cro. El. 447; *Sharp v. Sharp*, *ib.* 483; Co. Lit. 48 b. The rule that avoids every conveyance of land which is held adversely at the time of the conveyance, does not apply to a lease made by the State; for there can be no adverse possession as against the people. The people cannot be disseised. *The People v. The Mayor, &c.*, 23 Barb. 240.

² *Plowden*, 183-142; Co. Lit. 46 b; Cro. Jac. 60.

³ *Shep. Touch.* 269. See 2 R. S. of N. Y. 294, § 11; Code of Pro. § 84.

⁴ *Grout v. Townsend*, 2 Hill, 554. The

possession of a tenant in common law, however, long continued, is not, if unaccompanied with a claim of entire title, adverse to the co-tenants. *Smith v. Burtis*, 9 Johns. 174; *Thompson v. the Mayor, &c.*, 11 N. Y. 115. But it is otherwise if he actually excludes his co-tenant. *Northrop v. Wright*, 24 Wend. 221; *Humbert v. Trinity Ch.* *ib.* 587; *Butler v. Phelps*, 17 *id.* 642; *Sherry v. Frecking*, 4 Duer, 462.

⁵ *Fosgate v. Herkimer Manuf. Co.*, 9 Barb. 287; s. c. 12 *id.* 352. But where a grantor, after conveyance, remains in possession, it is not as owner, but as tenant to the grantee, and nothing but a clear, unequivocal, and notorious disclaimer of the latter's title can render the possession adverse. *Jackson v. Burton*, 1 Wend. 341; *Swart v. Service*, 21 *id.* 36. And see *Butler v. Phelps*, 17 Wend. 642.

⁶ *Bellingham v. Alsop*, Cro. Jac. 52; *Dymmock's case*, *ib.* 408; *Harvy v. Thomas*, Cro. El. 216. To constitute an adverse possession, the entry of the disseisor

there is an undisputed reversion in the lessor at the time of making a lease, it will be a good charge upon the reversion, and take effect in interest, and in possession also, if the reversion happens to be reduced into possession during the period limited by the contract for the enjoyment of the land; the lessor being estopped, by his own deed, from saying that he did not demise the premises.¹

§ 87. Although a lessor may have no title to the land he undertakes to demise, or may be a disseisor, his lease will still operate by way of estoppel if he comes into possession, by purchase or descent, at any time before the expiration of the term.² But as estoppels are not generally favored, and will not be admitted if they can be avoided, there will be no estoppel if some interest actually passed by the lease, though the interest purported to have been granted is really greater than the lessor had, at the time, power to grant. Thus if a lessee for the life of B. makes a lease for years, and then purchases the reversion in fee, after which the *cestui qui vie* dies, the lessor may avoid this lease, though several of the years therein expressed are still to come; for he may confess and avoid the lease, which took effect in point of interest, and determined on the death of B.³ So if two join in a lease, and

must have been at the time under claim or color of title. *Humbert v. Trinity Ch.* 24 Wend. 587; *Hoyt v. Dillon*, 19 Barb. 644. Otherwise it is a mere trespass. *Miller v. Platt*, 5 Duer, 272. It must be such as to raise the presumption of a deed, and the intention will guide the entry and fix its character. It must also be continued, uninterrupted, notorious, and exclusive; and the burden of proof is on the party alleging it to be so. 1 Hill. Real Prop. 47. Under the New-York statute, 1 R. S. 789, § 147, every grant of land is void, if, at the time of delivery, the land is in actual possession of a person claiming under a title adverse to that of the grantor. And the claim may be oral, if made by an actual occupant. *Humbert v. Trinity Ch. supra*. But if the entry is under color of title, the possession is adverse, however groundless the supposed title may be. The fact of possession and its character, the *quo animo* of the possessor, are the tests. *La Frombois v. Jackson*, 8 Cow. 589; *Livingston v. Peru Iron Co.*, 9 Wend. 511. The possession of a mere intruder, making no claim, is insufficient; but if such a one obtains a deed from one who enters claiming title, his possession under that deed is adverse from that time. *Jackson v. Smith*, 18 Johns. 406; *Jackson v. Frost*, 5 Cow. 346. Nor will the mere expectation of a grant suffice. *Howard v.*

Howard, 17 Barb. 663; *Luce v. Carley*, 24 Wend. 451. But it is no objection, that the grant was fraudulently obtained; *Bogardus v. Trinity Ch.* 4 Sandf. Ch. 633; or was without any foundation as matter of right, or unauthorized; *Jackson v. Elston*, 12 Johns. 452, and see *Bradstreet v. Clarke*, 12 Wend. 602, 674; *Bryan v. Atwater*, 5 Day, 181; *Clapp v. Bromagham*, 9 Cow. 530.

¹ *Milford v. Fenwick*, And. 288; s. c. *Moor*, 284; *Bould v. Winston*, Cro. Jac. 168; *Sutton's case*, Cro. El. 140. It has been held in Pennsylvania, that a purchaser at a sheriff's sale, who has not received his deed, cannot make a valid lease. *Hall v. Benner*, 1 Penn. 402.

² *Jackson v. Murray*, 12 Johns. 201; *Sinclair v. Jackson*, 8 Cow. 548; *Jackson v. Stevens*, 16 Johns. 110; *Cocke v. Brogan*, 5 Pike, 698; Co. Lit. 47, 227; *Hermitage v. Tomkins*, 1 Ld. Ray. 729; *Webb v. Austin*, 7 M. & G. 701; *Whitton v. Peacock*, 2 Bing. N. C. 411. If a man conveys land which is not his, and he afterwards purchases the land, he is, notwithstanding, bound by his deed, and will not be permitted to aver he had nothing, and the stranger to whom he sells will be equally estopped. Co. Lit. 45, a; 47, b; 352, a, b; *Rawlyn's case*, 4 Co. 53, a; *Iseham v. Morrice*, Cro. Car. 110; *Luxton v. Stephens*, 3 P. Wms. 373; *Jackson v. Bull*, 1 Johns. Cas. 81.

³ *Leicester v. Rehoboth*, 4 Mass. 180;

one only has any interest in the premises, it will enure by way of confirmation from the other, and not by way of estoppel.¹

§ 88. With respect to leases by estoppel, we may further observe, that an estoppel cannot operate after the estate of the lessor is determined; for it begins by, and therefore terminates with, the lease.² But where a lease for years cannot take effect immediately, by reason of a *prior lease* of the same premises, the second lease will operate presently by estoppel, for so much of the term as may be left after the determination of the former lease, by way of passing an interest.³ A grantor by deed is always estopped from saying he had no interest, unless he is a trustee for the public, deriving his authority from an act of the legislature; ⁴ but if it appears, from recitals in a lease, that he had nothing at the time of the demise, and he afterwards purchases the land, it will not enure to the lessee by estoppel.⁵ He is, however, estopped from contending that he had merely an equitable and not a legal estate when he granted the lease.⁶

§ 89. On the other hand, a lessee, by accepting a lease, is estopped from disputing the title of his lessor; ⁷ though he may show that the title has since expired, or that he has purchased a title which is not inconsistent with that under which he came into possession.⁸ Nor is he estopped, by a description of the land in a lease, from showing that what was there called meadow, was not, in point of fact, such.⁹ An assignee is also estopped by the deed which estops his assignor; ¹⁰ and, by executing an assignment, in which the original lease is recited, he is precluded, in an action by the assignor, from calling upon him to prove the lease.¹¹ Nor will an estoppel bar the lessee beyond the duration of the interest derived by him under the lease. Therefore, if a man take a lease for years, by deed indented of his own land, it is no conclusion beyond the term, at the end of which the lessor may enter and occupy the land; for, by the determination of the term, the estop-

ib. 273; Jackson v. Hoffman, 9 Cow. 271; Co. Lit. 47 b; Anon. Ventr. 358.

¹ Brereton v. Evans, Cro. El. 700.

² Jackson v. Ayres, 14 Johns. 224; Brudnell v. Roberts, 2 Wils. 143; Blake v. Foster, 8 T. R. 487; Brereton v. Evans, *supra*.

³ Gilman v. Hoare, 1 Salk. 275.

⁴ Fairtitle v. Gilbert, 2 T. R. 169.

⁵ Hermitage v. Tomkins, 1 Ld. Ray. 729.

⁶ Green v. James, 6 M. & W. 656.

⁷ Carpenter v. Thompson, 3 N. H. 204; Wood v. Day, 7 Taunt. 646.

⁸ Jackson v. Rowland, 6 Wend. 666; Neave v. Moss, 1 Bing. 360; Doe v. Skirrow, 7 Ad. & E. 157.

⁹ Skipwith v. Green, 1 Stra. 610.

¹⁰ Taylor v. Needham, 2 Taunt. 279; Barwick v. Thomson, 7 T. R. 488.

¹¹ Nash v. Turner, 1 Esp. 217.

pel is also determined.¹ And the acceptance of a lease, and the payment of rent, for the use of a wharf, will not, after the expiration of the term, estop the lessee from asserting a right to use it without the consent of the lessor.²

§ 90. All estoppels, however, must be reciprocal and mutual, for, as the whole estate is created by estoppel, both parties must be bound, or neither; if, therefore, a man takes a lease for years of his own land, from an infant or *feme covert*, it will work no estoppel, because infants or *femes covert*, by reason of their disability to contract, are not estopped, nor shall the lessee be, for the want of mutuality.³ This rule, requiring reciprocity in cases of estoppel, necessarily requires that the lease shall be by indenture, and not by deed poll; for both lessor and lessee must be bound, or neither.⁴ And, if by indenture, it must be executed by both parties, for an indenture executed by the one and not by the other is only equivalent to a deed poll; though, for this purpose, a lease executed by the lessor, and a counterpart by the lessee, are considered as one indenture.⁵ For a similar reason, a stranger can neither be bound by, nor take advantage of an estoppel, the rule being confined to privies in blood or estate.⁶

§ 91. But an estoppel is not confined wholly to the parties to the lease; for it is annexed to the estate, runs with the land, and is binding on all persons claiming under them. The heir of the reversioner being privy in blood, and taking the estate subject to the burdens imposed on his ancestor, is bound wherever that ancestor, leaving no estate in the premises, or only a contingent remainder, makes a lease by indenture, and afterwards purchases the fee of the land demised, and dies.⁷ The heir, however, will not be bound, unless he claims the land from him who created the estoppel; for, if he purchase the reversion himself, or if it devolve upon him by descent from another ancestor, he will not be bound.⁸

¹ Rawlyn's case, 4 Co. 54, a; James v. Landon, Cro. El. 36.

² Child v. Chappell, 9 N.Y. 246. In this case the court held that the defendant established his right to the easement claimed, both by direct grant and upon the principle of dedication.

³ The Welland Canal v. Hathaway, 8 Wend. 480; Co. Lit. 352; Bolling v. Mayor, 3 Rand. 563; Doe v. Skirrow, 7 Ad. & E. 157; Right v. Bucknell, 2 B. & Ad. 278.

⁴ Co. Lit. 363, b; Pike v. Eyre, 9 B. & C. 909; Wright v. Douglass, 10 Barb. 97.

⁵ Hill v. Saunders, 2 Bing. 112; Cardwell v. Lucas, 2 M. & W. 111; Wilson v. Woolfryes, 6 Maule & S. 341.

⁶ Jackson v. Brinckerhoff, 3 Johns. Cas. 101; Berlin v. Norwich, 10 Johns. 229; Braintree v. Hingham, 17 Mass. 432; Wallis v. Truesdell, 6 Pick. 455; James v. Landon, Cro. El. 37; Brereton v. Evans, *ib.* 700.

⁷ Webb v. Austin, 7 M. & G. 701; Weale v. Lower, Pollexf. 54; Co. Lit. 352, a.

⁸ Edwards v. Rogers, W. Jo. 460; Goodtitle v. Morse, 3 T. R. 371.

Nor will he be bound, unless the estoppel would have operated upon the inheritance in the hands of his ancestor; and, therefore, if tenant for life make a lease for years, and afterwards purchase the reversion and die within the term, his heir may enter; for, a freehold being a greater estate than any term of years, the decease of the tenant for life, out of whose estate the lessee's interest arose, is the regular period appointed by law for the determination of the lease.¹ Privies in estate are also bound, when a man makes a lease, by indenture, of property to which he has no title, and afterwards, becoming its owner in fee, disposes of it to another; for the purchaser will be estopped from disputing the lease.²

§ 92. An estoppel may also be by matter *in pais*, though not in writing,—as by livery, entry, acceptance of rent, or the like;³ for the rule is general, that where a person assents to an act, and derives title under it, he cannot afterwards be permitted to impeach it.⁴ But when the estoppel is by matter *in pais*, it is determined by the ceasing of the act which created the estoppel, although it is otherwise of an estoppel by matter of record.⁵ And in all cases where a party claims to establish his right by estoppel, the instrument on which he relies must be clear, precise, and unequivocal, and not depend upon inference.⁶ It must also be specially pleaded, and cannot be taken advantage of collaterally, or by inference.⁷ If, however, the instrument be not under seal, and operates *by way* of estoppel only, and not as a technical estoppel, it cannot be pleaded, but must be given in evidence under the proper issue joined in the case.⁸

¹ Treport's case, 6 Co. 15, a; Co. Lit. 47, b; Blake v. Foster, 8 T. R. 487; Carvick v. Blagrove, 1 Brod. & B. 531.

² Trevivian v. Lawrence, Holt, 282; Webb v. Austin, *supra*. Although a lessee may maintain an action of covenant against his lessor on a lease by estoppel, the same privilege, it is said, does not extend to his assignee. Style v. Hearing, Cro. Jac. 73; Awder v. Nokes, Cro. El. 373-436.

³ Springstein v. Schermerhorn, 12 Johns. 357; Co. Lit. 352.

⁴ Dezell v. Odell, 3 Hill, 215; Rex v. Stacy, 1 T. R. 4. An admission by the defendant, intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction, constitutes an estoppel *in pais*. Dezell v. Odell, *supra*;

Eldred v. Hazlett, 88 Pa. St. 16. And it exists against a party, where it appears, 1st, that he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim which he proposes to set up; 2d, that the other party acted on the admission; and 3d, that he will be injured by allowing the truth of the admission to be disproved. Plumb v. Cattaraugus Ins. Co., 18 N. Y. 392; Martin v. Angell, 7 Barb. 407; Pickard v. Sears, 6 Ad. & E. 474. It never takes place where one party did not intend to mislead, and the other party is not actually misled, Jewett v. Miller, 10 N. Y. 402; Turner v. Coffin, 12 Allen, 401.

⁵ James v. Landon, Cro. El. 36; Brereton v. Evans, *ib.* 700; Co. Lit. 47, b.

⁶ Rich v. Hotchkiss, 16 Conn., 409. Lajoie v. Primm, 8 Mc. 529.

⁷ Lansing v. Montgomery, 2 Johns. 328.

⁸ Davis v. Tyler, 18 Johns. 490.

SECTION I.

LEASES BY INFANTS.

§ 93. A minor cannot make leases that will bind him when he arrives at full age;¹ the rule being now well settled in this country, as well as in England, that all contracts (except for necessities) made by a minor, including his deeds and other instruments under seal, are voidable; that is, he may disavow and so annul them, either at or before his majority, or within a reasonable time after it.² But if he makes a lease rendering rent, it passes an interest in the estate to the lessee, and binds the adult party, until the minor chooses to avoid it.³ If, however, the lease is by deed, he cannot avoid it, until he comes of age; although he may always enter and take the profits, until the time arrives when he has legal capacity to affirm or disaffirm the deed, and the instrument of lease will not be rendered void by such an entry, for he may still affirm it at full age.⁴ But when the lease is by parol, if he ratifies it, on coming of age, as by receiving rent that accrues after that period, or the like, he confirms the lease, and cannot afterwards impeach it.⁵

§ 94. Very slight acts and circumstances are sufficient to show an infant's assent to a contract after his majority.⁶ In fact, our

¹ *Roof v. Stafford*, 7 Cow. 179; *Johnson v. Facker*, 1 Nott & McC. 1; *Roberts v. Wiggin*, 1 N. H. 74; *Jackson v. Carpenter*, 11 Johns. 539. A rent-charge granted by an infant is voidable only. *Hudson v. Jones*, 3 Mod. 810.

² *Bool v. Mix*, 17 Wend. 119; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *Per Story, J.*, in *Tucker v. Moreland*, 10 Pet. 71; *Wheaton v. East*, 5 Yerg. 41; *Worcester v. Eaton*, 18 Mass. 371; *Roberts v. Wiggin*, 1 N. H. 73; *Phillips v. Green*, 5 T. B. Monr. 344; *Farr v. Sumner*, 12 Vt. 28. The rule seems to be universal that all deeds or instruments under seal, executed by an infant, are voidable only with the single exception of those which delegate a naked authority, which are void. *Per Bronson, J.*, in *Bool v. Mix*, *supra*.

³ *Zouch v. Parsons*, 3 Burr. 1794; *Walmsley v. Lindenberger*, 2 Rand. 478; *U. S. v. Bainbridge*, 1 Mas. 82; *Goodsell v. Myers*, 8 Wend. 479; *Brown v. Caldwell*, 10 S. & R. 114.

⁴ *Roof v. Stafford*, 7 Cow. 179; 9 *id.* 626; *Bac. Abr.*, tit. *Infancy*, *Bool v. Mix*,

supra. Infant cannot avoid his lease by deed during minority. *Slator v. Trimble*, 14 Irish Com. L. 342.

⁵ *Smith v. Low*, 1 Atk. 489; *Brown v. Caldwell*, 10. S. & R. 114; *Co. Lit.* 308, a; 1 *Rol.* 730; *Smith v. Bowin*, 1 Mod. 25; *Warwick v. Bruce*, 2 Maule & S. 205; 4 *Leon.* 4.

⁶ *Houser v. Reynolds*, 1 Hayw. 148; *Den v. Stowe*, 2 Dev. & B. 320. But in *Slator v. Trimble* 14 Irish Com. L. 342, acceptance of rent was held an affirmation of a lease during minority, though infant had commenced an ejectment before majority, and had demised the land to another. In England, by statute 9 Geo. IV. c. 14, § 5, it is necessary that the ratification be in writing, signed by the party to be charged thereby; but any writing is sufficient, which, in an adult, would be considered an adoption or ratification of an act done by one acting as an agent. *Harris v. Wall*, 1 Exch. 122; *Hartley v. Wharton*, 11 Ad. & E. 934. A similar statute exists in Maine.

authorities seem to authorize the statement of the rule to be, that no distinct act of confirmation is necessary, but that all the voidable contracts of an infant are binding upon him, unless there be an express disaffirmance on his part, on his coming of age.¹ The mere execution, however, after he attains his age, of another lease or conveyance of the same property, even to a purchaser for value, is no disaffirmance of an infant's deed.² To render such subsequent conveyance, after he arrives of age, an act of dissent to the prior deed, it must be so inconsistent therewith, that both deeds cannot stand together.³

§ 95. None, however, but the infant himself, or his personal representatives, can avoid a lease. Being a personal privilege, intended for his benefit, he is, while living, the exclusive judge of the propriety of exercising it; and when dead, those alone should interfere who legally and personally represent him.⁴ For this reason, mere privies in estate, such as assignees or guardians, cannot avoid an infant's lease.⁵ And so little encouragement do the courts afford to a defence of this description, that when a plea of infancy is interposed, the burden of proof rests on the infant alone, even though the issue be upon a ratification of his contract after he came of age.⁶

§ 96. As to an infant lessee, we may observe, that, although a lease made to an infant is equally voidable on his part with one made by him, it is always available for the purpose of vesting the estate in him; but as to his liability for rent, or the performance

¹ *Zouch v. Parsons*, *supra*; *Holmes v. Blogg*, 8 Taunt. 35; *Jackson v. Burchin*, 14 Johns. 124; *Curtin v. Patton*, 11 S. & R. 305; *Cheshire v. Barrett*, 4 McCord, 241; *Richardson v. Boright*, 9 Vt. 368. The rule was stated in a Connecticut case, to be that there are three ways of affirming the voidable contracts of an infant, when he arrives at full age; 1. By an express ratification; 2. By acts which reasonably imply an affirmance; 3. By his omission to disaffirm within a reasonable time. *Kline v. Beebe*, 6 Conn. 494; *Worcester v. Eaton*, 13 Mass. 871.

² *Boal v. Mix*, *supra*; *Dominick v. Michael*, 4 Sandf. 374. In order to avoid the deed of an infant, after he comes of age, he must, before suit brought, make an entry on the land, and execute a deed to a third person, or do some other act of equal notoriety, in disaffirmance of the deed. *Voorhies v. Voorhies*, 24 Barb. 150.

³ *The Eagle Fire Co. v. Lent*, 6 Paige, 635. Mere acquiescence in a conveyance, after majority, without any intermediate benefit, such as the possession of the premises, or the collection of rent, is no affirmance of the conveyance. *Jackson v. Carpenter*, 11 Johns. 589. And no bare recognition, or silent acquiescence, for any time less than the period of statutory limitation, will amount to a ratification of a deed. *Voorhies v. Voorhies*, *supra*; *Jackson v. Burchin*, *supra*.

⁴ *Jackson v. Todd*, 6 Johns. 257; *Roberts v. Wiggin*, 1 N. H. 73; *Hartness v. Thompson*, 5 Johns. 160.

⁵ *Hoyle v. Stowe*, 2 Dev. & B. 323. But see *Dominick v. Michael*, *supra*; *Whittingham's case*, 8 Co., 42 b; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Oliver v. Houdlet*, 13 Mass. 237; *Irvine's Heirs v. Crocket*, 4 Bibb. 437.

⁶ 2 Greenleaf on Ev. § 362; *Jeune v. Ward*, 2 Stark. 326.

of other stipulations usually contained in a lease, he is in the same situation he would be in as in case of any other contract, for he may disaffirm it when he comes of age. As a general rule, he is liable for necessities; and, although this is a relative term, depending upon his situation in life, lodging probably comes within this description; and, therefore, where an infant rented a house, and exercised his trade as a barber therein, it was held to be properly left to the jury to decide, in an action to charge him with the rent of the house, whether it came within the meaning of the term necessities.¹ If, however, after his full age, he continues in possession of lands demised to him during his minority, he thereby affirms the lease and becomes liable for rent; and he must make his election to avoid the lease, if at all, within a reasonable time after he attains his full age.² It belongs to a jury to determine what is a reasonable time, under the circumstances of each particular case; but an acquiescence of four months after majority has been held to preclude an infant from afterwards disaffirming a lease.³

SECTION II.

BY PERSONS OF UNSOUND MIND.

§ 97. Idiots and lunatics, being void of understanding, and consequently unable to give the deliberate assent necessary to the validity of a contract, are, on principles of humanity as well as of justice, restrained from making any contract.⁴ But previous or subsequent lunacy will not vitiate a contract entered into during an interval of sanity.⁵ Mr. Justice Story, in his Commentaries on Equity Jurisprudence, lays it down as a general principle, that the contract of any person who is *non compos mentis*, — from age, imbecility, or other personal infirmity, — is absolutely void.⁶ But this rule does not seem to apply to a deed, for the

¹ *Lowe v. Griffiths*, 1 *Hodges*, 30; *Hands v. Slaney*, 8 *T. R.* 578.

² *Bac. Abr. tit. Infant*, p. 611.

³ *Doe v. Smith*, 2 *T. R.* 436; *Holmes v. Blogg*, 8 *Taunt.* 35.

⁴ *Faulder v. Silk*, 8 *Camp.* 126; *Seaver v. Phelps*, 11 *Pick.* 304; *Jackson v. King*, 4 *Cow.* 207; *Dane v. Kirkwall*,

8 *C. & P.* 679. An idiot is one who is a natural fool, or one a *nativitate*. A lunatic is one who has become *non compos mentis* by the visitation of God.

⁵ *Jackson v. King*, *supra*; *Johnson v. Moore*, 1 *Litt.* 371; *Owen v. Davies*, 1 *Ves. sr.* 82.

⁶ 1 *Story, Eq. Jur.* § 222.

deed of a person who is *non compos mentis* is only void if he be under guardianship; but if he is not under guardianship it is merely voidable, and may become void according to circumstances.¹ The guardian or committee of a lunatic is generally authorized to execute leases of his property, under the direction of the court making the appointment, but, without the aid of a statutory provision conferring such authority upon the court, the committee of a lunatic would have no such power.²

§ 98. Mere weakness of mind is not, of itself, a sufficient ground for avoiding any contract, unless some stratagem or fraud is resorted to by the person in whose favor it is made; for, if a man be legally *compos mentis*, he is the disposer of his own property, and his will stands as a reason for his actions.³ Thus, if an illiterate person is induced to sign a deed, by a misrepresentation of its nature and contents, such deed, being obtained by fraud, is void;⁴ but if he did not request it to be read to him, and no false representation of its contents was made to him, it will not be avoided merely on the ground of his ignorance.⁵ Even a person who is deaf and dumb from his birth, having, however, sufficient intellectual capacity to comprehend the nature of his acts, is not legally incapable of executing a deed; and, although its contents are not fully communicated to him, for the want of sufficient signs, it will

¹ *Wait v. Maxwell*, 5 Pick. 217; *Webster v. Woodford*, 8 Day, 90. The lunacy of a mortgagor does not absolutely avoid the mortgage: it is, at most, voidable at the election of the lunatic or his personal representatives, or those claiming some interest under him in the premises. A lunatic is not absolutely disqualified from making a contract: the law will, in certain cases, even raise one by implication (*Wentworth v. Tubb*, 2 Younge & C. Ch. 537). There is a strong analogy between a lunatic and an infant in relation to their power to contract. Either can oblige himself for necessities, and the law provides for each a formal process by which to avoid their agreements. Per Gardiner, J., in *Ingraham v. Baldwin*, 9 N.Y. 45. All contracts made by an idiot, lunatic, or habitual drunkard, after the actual finding of an inquisition, are absolutely void. *L'Amoureux v. Crosby*, 2 Paige, 422; *White v. Palmer*, 4 Mass. 147; *Beverly's case*, 4 Co. 126, b.

² *Knipe v. Palmer*, 2 Wils. 180. After a commission to inquire into an alleged case of lunacy has issued, and before inquisition found, all persons deal with the

suspected individual at their peril; and conveyances made by him after that event will be set aside if the person dealing with him knew that proceedings had been taken. *Griswold v. Miller*, 15 Barb. 520. There are later decisions also to the effect, that a contract is not vitiated by the unsoundness of mind of one of the contracting parties if this fact is unknown to the other, and no advantage is taken of the lunatic. But the rule applies to cases in which the contract is not merely executory, but has been executed in whole or in part, so that the parties cannot be restored altogether to their original position. *Molton v. Camroux*, 2 Exch. 487; s. c. 4 Exch. 17; *Beavan v. McDonnell*, 9 Exch. 309.

³ *Dods v. Wilson*, Const. 448; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoemaker*, 24 id. 85; *Jackson v. King*, 4 Cow. 207, 218; *Osmond v. Fitzroy*, 8 P. Wms. 180; *Toomes v. Conset*, 2 Atk. 251; *Sprague v. Duel*, 11 Paige, 480.

⁴ *Jackson v. Hayner*, 12 Johns. 469; *White v. Small*, 2 Ca. in Ch. 103.

⁵ *Hallenbeck v. Dewitt*, 2 Johns. 404.

be sufficient if he knew he was making a conveyance of his estate.¹ Yet if, by fraud and misrepresentation, a lease different from the one directed to be prepared be imposed upon a blind man for execution, he may afterwards treat it as a nullity.² Persons deaf, dumb, and blind from their nativity, labor under an absolute incapacity.³

§ 99. Nor does old age simply incapacitate a person from granting a lease. Fraud and imposition would, of course, defeat it; but the mere circumstance of age is not a sufficient ground from which to presume imposition; for, as Mr. Justice Buller observed in the case quoted, we have seen the greatest abilities displayed at a greater age than seventy-five.⁴ So a lease made by a party under duress is not void, but voidable only by him when he recovers his free agency; but he cannot avoid it under the plea of *non est factum*, for it is his deed at the time of action brought; and he can only avoid it by a special plea.⁵

§ 100. If a person is in an extreme state of intoxication, so as to be deprived of the exercise of reason, a lease obtained from him, while in that condition, would be absolutely *void*.⁶ This, however, is an extension of the old rule of law on the subject, which was, that it was only in cases where an unfair advantage had been taken of a drunken person, or contrivance or management was resorted to for the purpose of drawing him into drink, that equity would relieve him.⁷ The old jurists, in fact, held that a man was not to be relieved at all from a contract which he had made while drunk.⁸ But the modern doctrine, concurring with all the civil-law writers, now is, that a contract made under such circumstances is void. Under a plea of *non est factum*, therefore, a defendant will be permitted to give in evidence that he was made to sign the deed when he was

¹ *Brown v. Brown*, 8 Conn. 299; *Brower v. Fisher*, 4 Johns. Ch. 441; Co. Lit. 42, b; *Shulter's case*, 12 Co. 90, a.

² *Shulter's case*, *supra*; *Manser's case*, 2 Co. 3, a, and *Thoroughgood's case*, *ib.* 9, a.

³ Co. Lit. 42, b; Com. Dig. (Capacity), D, 4.

⁴ *Lewis v. Pead*, 1 Ves. 19; *Waters v. Barral's Heirs*, 2 Bush, 598.

⁵ *Whelpdale's case*, 5 Co. 119, a; *Thoroughgood's case*, *supra*. By duress is meant that degree of severity, either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. Greenl. on Ev. § 801.

⁶ *Prentice v. Achorn*, 2 Paige, 80; *Barrett v. Buxton*, 2 Aik. 167; *Pitt v. Smith*, 8 Camp. 88; *Fenton v. Holloway*, 1 Stark. 128; *Cooke v. Clayworth*, 18 Ves. 16; in the matter of *Ann Lynch*, 5 Paige, 120. Where a person, for any considerable part of his time, is intoxicated to such a degree as to be deprived of his ordinary faculties, it is *prima facie* evidence that he is incapable of managing his affairs, or of making a contract. In the Matter of *Tracy*, 1 Paige, 582.

⁷ *Cory v. Cory*, 1 Ves. sr. 19; 1 Fonb. Eq. 67; 1 Mad. Ch. 308.

⁸ *Beverley's case*, 4 Co. 125; *Osmond v. Fitzroy*, 3 P. Wms. 180.

so drunk that he did not know what he did.¹ The decisions of some of our southern courts, however, would make the contract of an intoxicated man *voidable* only; and not to be avoided, if his assent is afterwards given when he becomes sober.² But it is admitted that the evidence of complete and total drunkenness ought to be clear and satisfactory.³

SECTION III.

BY AND TO MARRIED WOMEN.

§ 101. The free agency and ability of a married woman to make a contract being entirely suspended during marriage, she is incapable at common law, without the concurrence of her husband, of making a valid lease of lands, of which they are seised in her right, or of which she is possessed in her own right. Her separate deed, being absolutely void, does not admit of confirmation; and it is only when made under a power contained in a settlement authorizing such acts that her individual leases could be sustained. The husband has sole dominion over his wife's lands, with a right to lease and take the rents and profits so long as the marriage relation subsists; and if a living child be born of the marriage, he has the same right during his own life, if he survives her.⁴ And as to lands of which the wife possesses a chattel interest only, the husband has an exclusive and absolute power of disposing of them, as against his wife; though, on his failing to dispose of them in his lifetime, they will belong to her in preference to his personal representatives.⁵ If he dies before her, he cannot dispose of them by his will; but, if he survives her they become his own absolute property.⁶ But his power of leasing her freehold estates is restricted to the continuance of a demise, made

¹ *Cole v. Robbins*, Bul. N. P. 172; *Fenton v. Holloway*, 1 Stark. 126.

² *Reinicker v. Smith*, 2 Har. & J. 421; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Inabnet*, 1 Bailey, 848.

³ *Adm'r of Lee v. Ware*, 1 Hill, S. C. 313.

⁴ *Jackson v. McConnell*, 19 Wend. 175; *Chancy v. Strong*, 2 Root, 389; Co. Lit. 46, b; 351, b; *Manby v. Scott*, 1 Sid. 120; *Zouch v. Parsons*, 3 Burr. 1805; 4 Kent. Com. 28.

⁵ *Druce v. Denison*, 6 Ves. 394; *Wildman v. Wildman*, 9 id. 177; *Sym's case*, Cro. El. 88; *Loftus' case*, ib. 278; *Hayward v. Hayward*, 20 Pick. 517; Co. Lit. 351, b.

⁶ *Jones v. Patterson*, 11 Barb. 572; *Hyde v. Stone*, 9 Cow. 280; *Watson v. Bonney*, 2 Sandf. 405; Co. Lit. 300, a, b, 351, a. The same result follows a divorce. *a vinculo matrimonii*. *Legg v. Legg*, 8 Mass. 99; see also *Vallance v. Bausch*, 28 Barb. 683.

by himself alone, beyond the period of their joint lives, unless he becomes entitled as tenant by the curtesy; in which case the lessee may remain in possession during the remainder of the term, subject to a sooner determination by the death of the lessor.¹

§ 102. The husband's lease of his wife's lands, in which she has not joined, will only bind her during the lifetime of her husband, for after his death she may confirm or avoid it at pleasure; yet, until she avoids it by entry, it will stand good.² And the acceptance of rent by her which has accrued since the death of her husband, will be deemed evidence of its affirmance.³ But a mere verbal lease by husband and wife, of her lands, or a written lease to which she is not a party, is void as to the wife, and cannot be affirmed by her assent after the death of the husband, for her consent at the commencement of the term must appear by deed.⁴

§ 103. The common law, also, held every conveyance of a *feme covert* absolutely void, except when done by matter of record, as by a fine and recovery; and even then, unless her husband was a party to the record, he might avoid it.⁵ But this mode of conveyance is now abolished by the English statutes, and has never been in force in the United States;⁶ but by local usage in several if not all the States the wife's deed, in which her husband joined, followed by her separate acknowledgment, sufficed.⁷ By the New

¹ *Dixon v. Harrison*, Vaugh. 46; *Miller v. Manwaring*, Cro. Car. 897; *Marquat v. Marquat*, 12 N. Y. 836.

² *Doe v. Weller*, 7 T. R. 478; *Jackson v. Holloway*, 7 Johns. 81; *Brown v. Lindsay*, 2 Hill, Ch. S. C. 542; *Jordan v. Wikes*, Cro. Jac. 332; *Smallman v. Agborow*, *ib.* 417; *Greenwood v. Tyber*, *ib.* 568.

³ *Worthington v. Young*, 6 Ohio, 818; *Wotton v. Hele*, 2 Saund. 180.

⁴ *Turney v. Sturges*, Dyer, 91 a; *Walsal v. Heath*, Cro. El. 656; *Jackson v. Holloway*, *supra*.

⁵ We have stated what is understood to be the common law of this country on the subject of marital rights with respect to leases; but these rights have, as we shall presently observe, been materially modified by statutory provisions in several of the States. By these statutes, which have been enacted in New York, Pennsylvania, Maine, New Hampshire, Massachusetts, Connecticut, Ohio, Illinois, Kentucky, Iowa, Wisconsin, and Alabama, New Jersey, Indiana, and Rhode Island, the common law, which makes marriage a gift of all a woman's personal property

to the husband, is repealed; and a woman who marries without any antenuptial contract, retains her property and all her subsequent acquisitions. She can hold separate property at law, as she formerly could only in equity, and is liable, so far as this goes, on her separate contracts, whether made before or after marriage. Mr. Parsons, in his admirable elementary treatise on mercantile law, speaking of these statutory innovations upon the common law, says, "It is in truth a very difficult question, how far it is well to abrogate the old law, which was of feudal origin, and so far inappropriate to our own state of society. After sufficient experiment, we shall know better than we know now, how to pay a due regard to the property and the rights of the wife, and yet preserve the marriage relation from the mischiefs and degradation which must ensue, if husband and wife are no longer one person in any sense, but may bargain together, and buy and sell, and own, and pay, with or from, or to each other, precisely like other persons."

⁶ *Meriam v. Harsen*, 2 Barb. Ch. 282.

⁷ *Thatcher v. Omans*, 8 Pick. 521;

York Colonial Act of 1771, and similar enactments in other States, these modes of conveyance, with separate acknowledgment, were established or confirmed.¹

§ 104. Recent legislation has still further modified the common law with respect to the right of a married woman to control her separate estate, giving her power to take, hold, enjoy, and dispose of property, whether leasehold or otherwise, with the rents, issues, and profits, in the same manner and with like effect as if she were unmarried. But in most of the United States the husband's joinder or concurrence in the lease or conveyance of his wife's real estate is still necessary,² though in some she may convey as if sole, and without his concurrence.³ And, with respect to the acknowledgment of the deed, it has been repeatedly held in New York, since the passage of the law of 1848, that no private examination of a married woman is necessary, under any circumstances, where she conveys lands which have been acquired by her subsequently to the passage of the act.⁴ She cannot, however, either separately or jointly with her husband, execute a valid power of attorney for either purpose; since the statutes which gave her a right to convey by deed do not authorize her to delegate such right to another.⁵

Davey v. Turner, 1 Dall. 11; *Watson v. Bailey*, 1 Binn. 470; *Fowler v. Shearer*, 7 Mass. 14; *Gordon v. Haywood*, 2 N. H. 402; *Manchester v. Hough*, 5 Mas. 67; *Lithgow v. Kavenagh*, 9 Mass. 172; *Jackson v. Holloway*, *supra*. The Revised Statutes of New York further provided that a non-resident *feme covert* might convey lands in that State by deed jointly with her husband, and the acknowledgment or proof of execution might be as if she were sole.

¹ *Grout v. Townsend*, 2 Hill, 554; *Boal v. Mix*, 17 Wend. 119; *Jackson v. Gilchrist*, 15 Johns. 89; *Colcord v. Swan*, 7 Mass. 291; *Sawyer v. Little*, 4 Vt. 414; *Albany Ins. Co. v. Bay*, 4 N.Y. 9.

² Thus in Massachusetts, to any thing more than a lease for one year. Gen. Stat. c. 108, § 2. In New Jersey, the husband must consent. *Den. v. Lawshee*, 4 Zab. 618. So in Minnesota, unless the wife is authorized by a power. Gen. Stat. 1858, c. 61, § 108. In Pennsylvania, though the wife is vested with her antenuptial property in the broadest terms, both must join. See *Peck v. Ward*, 18 Pa. St. 506; *Thorn-dell v. Morrison*, 25 id. 826; *Shinn v. Holmes*, *ib.* 142. So in Rhode Island; Gen. Stat. 1857, c. 136, §§ 4-8; Vermont; R. S. c. 65, § 2; c. 71, § 1; Maryland; Gen. L. c. 45, §§ 1-3; Ohio, see *Miller v. Hine*, 18 Ohio, 585; Indiana; R. S. c. 77, § 4; *Reese v. Cochran*, 10 Ind. 195. So in Missouri,

Virginia, Kentucky, Tennessee, Alabama, Florida, Mississippi, Arkansas, Texas, and California. In Delaware, the common law still obtains, and joinder is necessary; *Harris v. Burton*, 4 Harringt. 66. So in Connecticut; while in Georgia, the wife's realty vests in the husband by the marriage.

³ So in Maine, New Hampshire, New York, Michigan, Illinois, and Iowa. Thus she may lease to any one, even to her husband; *Albin v. Lord*, 89 N. H. 196; or convey to him directly; *Allen v. Hooper*, 50 Me. 871; *Farr v. Sherman*, 11 Mich. 88.

⁴ *Blood v. Humphrey*, 17 Barb. 660; *Yale v. Dederer*, 18 N. Y. 271; *Wiles v. Peck*, 26 id. 42. But a separate acknowledgment is still necessary in Rhode Island. Gen. Stat. 1857, c. 136, §§ 4-8; New Jersey, *Den. v. Lawshee*, 4 Zab. 618. So in Pennsylvania, North Carolina, and Kentucky.

⁵ *Sumner v. Conant*, 10 Vt. 1; *Lane v. McKean*, 3 Shep., 304. An exception, however, to this general rule now prevails in New York; for by a statute of that State, when any married woman residing out of the State shall have joined or shall join with her husband in executing a power of attorney for the conveyance of real estate, situated in the State, the conveyance executed in virtue of such power shall have the same force and effect as if executed by such married

And though at common law, from her general inability to contract, a married woman was not bound by an agreement to lease, or by any express covenant contained in a lease either at law or in equity,¹ yet this has been materially altered by recent statutes in several States.²

§ 105. The same reasons which prevented a married woman from making a lease also disqualified her from assuming the responsibilities of a lessee. A *feme sole* might, of course, be a lessee; and, if she afterwards married, her responsibilities in that character devolved on her husband, who was liable, as well after his wife's death as before, to an action for arrears of rent, although the lease had expired.³ But a married woman was not incompetent to take a lease, nor was the express assent of her husband necessary for that purpose, for the estate vested till he dissented.⁴ She might, however, avoid such a lease after his decease.⁵ And, if she occupied a house, her husband was liable for rent accruing during her occupation; but the landlord could have no personal remedies against her by virtue of such occupation, either separately or jointly with her husband.⁶ But this incapacity to be bound as lessee has been removed to the extent to which *femes covert* are now authorized by statute to contract.⁷

§ 106. In a leading English case,⁸ Lord Eldon declared the rule of law to be, that no act of a wife can render her liable to be

woman in her own person; provided, that the execution of the power of attorney by such married woman shall have been first duly proved, or acknowledged, according to the provision of the statutes in relation to conveyances executed by married women residing out of the State. Laws of 1835, c. 275.

¹ Jackson v. Vanderheyden, 17 Johns. 167; Martin v. Dwelly, 6 Wend. 1; Butler v. Buckingham, 5 Day, 492; Grout v. Townsend, 2 Hill, 654; *Ex parte* Thomas, 8 Greenl. 50; Aldridge v. Burlison, 8 Blackf. 201.

² Thus in New Hampshire and Massachusetts she is bound by all contracts in relation to her property or business. Mass. Gen. Stat. c. 108, § 2; Chapman v. Foster, 6 Allen, 186; N. H. Comp. Stat. 1853, c. 382; Ames v. Foster, 42 N. H. 881. So in Maryland, Michigan, and Iowa, in respect of her separate property. Md. Laws, 1867, c. 223; Tillman v. Shackleton, 15 Mich. 447. Iowa, R. S. c. 101. In New York, by contracts in respect of her separate property or trade. N. Y. Stat. 1860, March 20; Barton v. Beer, 35 Barb. 178; Coster v. Isaacs, 1 Rob. N. Y. 176. Wisconsin, on contracts necessary for enjoyment of her separate property, Conway v. Smith, 18

Wisc. 128; Leonard v. Rogan, 20 id. 540. In Georgia and South Carolina, in respect to her sole trade. Waters v. Bean, 15 Ga. 358. And in Alabama and Mississippi, by contracts for necessities for the household. Ala. Code, § 1987; Miss. Rev. Code, 1857, c. 40.

³ Vane v. Minshall, 1 Lev. 25; Anon., 6 Mod. 289.

⁴ Swaine v. Holman, Hob. 204; Co. Lit. 3, a.

⁵ Co. Lit. 3, a. Vincent v. Buhler, 22 N. Y. 450.

⁶ Rotch v. Miles, 2 Conn. 688; Edwards v. Davis, 16 Johns. 281; Hatchett v. Baddeley, 2 W. Bl. 1079; Marshall v. Rutton, 8 T. R. 545; Fowler v. Shearer, 7 Mass. 14; Albany Ins. Co. v. Bay, 4 N. Y. 9. But see, *contra*, Lawrence v. Heister, 8 Har. & J. 371; Sumner v. Conant, *supra*.

⁷ See *ante*, note 3, to § 104. Thus in Coster v. Isaacs, 1 Rob. N. Y. 176, a *feme covert*, carrying on a separate business, was held liable for rent of store used by her for that business, under Statute 1860, c. 90, § 2.

⁸ Lord St. John v. Lady St. John; 11 Ves. 529.

sued as a *feme sole*; and this is understood to be the law generally in this country.¹ And it will make no difference, as to this disability of a married woman, that she is at the time living separate and apart from her husband; or that she has a separate maintenance secured to her; or that she has eloped, and is living in a state of adultery; or even that she is separated from her husband by a decree of divorce *a mensa et thoro*; for nothing short of a divorce *a vinculo matrimonii* will restore her ability to contract.² Yet if her husband is a non-resident alien;³ or becomes civilly dead; is imprisoned for life, or for a term of years, her disability is suspended during such period, and her capacity to contract and assume the responsibilities of a lessee is restored.⁴

§ 107. But Lord Mansfield, in a previous case, had introduced a principle of the civil law, that a woman living apart from her husband on a competent maintenance might contract as a *feme sole*;⁵ which, although it was directly overruled by the above cases, has, to some extent, been adopted in the States of New York, Pennsylvania, and South Carolina. Thus, in New York it was held, that if a wife live apart from her husband on a separate maintenance which he pays, he will not be answerable for necessities furnished her;⁶ while, in the latter States, she is allowed to act as a *feme sole* trader, and become liable as such. The principle of these latter cases would probably authorize her agreement to pay rent, and assume the responsibilities of a lessee, under similar circumstances; and there is now no doubt of it, in those States which by statute have enabled a married woman to hold separate property, and contract in relation thereto.⁷

¹ 2 Kent, Com. 161.

² *Marshall v. Rutton*, *supra*; *Lean v. Shutz*, 2 W. Bl. 1195; *Hyde v. Price*, 8 Ves. 443; *Lewis v. Lee*, 8 B. & C. 291; *Faithorne v. Blaquiere*, 6 Maule & S. 78; *Rawlins v. Vandyke*, 8 Esp. 250.

³ *Gregory v. Paul*, 15 Mass. 81; *Abbot v. Bayley*, 6 Pick. 89; *De Gaillon v. L'Aigle*, 1 B. & P. 857.

⁴ *Ib.*; *Hatchett v. Baddeley*, *supra*.

⁵ *Corbett v. Poelnitz*, 1 T. R. 5.

⁶ *Baker v. Barney*, 8 Johns. 72.

⁷ *Burke v. Winkle*, 2 S. & R. 189; *Newbiggin v. Pillans*, 2 Bay, 162; *Laws of Maine*, 1844; *New York and Pennsylvania*, 1848; *Connecticut*, 1849; *New Hampshire*, 1853; *Massachusetts*, 1855; *Ohio*, 1861; *Illinois*, 1861; *Iowa*, *Kentucky*, and *Wisconsin*, 1862. Since the passage of the law in New York enabling a married

woman to hold separate property, it has been held that, where she takes a lease for a term of years, the term becomes her separate estate; and, although she is not bound personally by the covenants in the lease on her part, so as to create a cause of action for the recovery of money against her, yet the use and occupation of the premises by her, creates a charge upon her separate estate for the rent, on the ground that the charge grows out of the beneficial nature of the contract to her individually. *Taylor v. Glenny*, 22 How. Pr. R. 240. As to what creates a charge upon the separate estate of a married woman, see *Yale v. Dederer*, 22 N. Y. 450; and, further, as to her separate liability, *Sexton v. Fleet*, 2 Hilt. 477; and *Laws of New York of 1862*, 845, c. 172, § 7; c. 460, § 12.

SECTION IV.

BY A TENANT FOR YEARS OR FOR LIFE.

§ 108. Not only has the owner of the soil a right to make a lease, but *his tenant*, so long as his interest lasts, has also a right to underlet to any person he may think proper, without consulting the landlord; for, while his interest in the premises continues, he has the absolute disposition of it, unless some agreement subsists between him and the landlord, that limits his power to do so.¹ And such derivative lessee may be compelled by his immediate landlord to pay rent, and perform covenants, according to the terms agreed upon between them; although he is not liable to the original lessor for the rent reserved on the first lease, since there is no such privity between him and the original lessor, as there is between a lessee and assignee.²

§ 109. An under-lease vests only a partial estate in the under-lessee, a reversion being left in the lessor, the duration of which is immaterial, for it may be a year, a day, or an hour. And if rent is reserved in the under-lease, it need not contain a power of distress, for such power is incident to every demise at common law.³ But as no privity exists between an under-lessee and the original lessor, the covenants entered into between the latter and the original lessee, though they be covenants running with the land, as to pay rent, or repair, cannot affect the under-lessee personally.⁴ The land, however, is not discharged by the under-lease from the claims of the original lessor, who, notwithstanding the under-lease, may proceed to distrain or evict either tenant or under-tenant, if rent be in arrear, or a forfeiture is incurred by his lessee.⁵ But an assignment transfers the whole interest of the lessee to the assignee; and, if the whole interest is conveyed, the essence of the instrument, as an assignment, so far as the original lessor, or strictly reversionary rights are concerned, will not be destroyed by

¹ Jackson v. Harrison, 17 Johns. 66. A change of tenants, of an insured building, without the consent of the insurance company, does not vitiate the policy. Gates v. The Madison Ins. Co., 5 N. Y. 469.

² McFarlan v. Watson, 8 N. Y. 286; Jackson v. Davis, 5 Cow. 129.

³ Co. Lit. 141, b, 142, a; Curtis v.

Wheeler, 1 Mood. & M. 493. We have, of course, no reference to leases of land in those States where the right of distress is abolished.

⁴ Holford v. Hatch, 1 Doug. 183; Earl of Derby v. Taylor, 1 East, 502; Doe v. Byron, 1 C. B. 623-626.

⁵ Arnaby v. Woodward, 6 B. & C. 519.

its reserving a rent to the assignor, with a power of re-entry for non-payment; nor by its assuming, by the use of the word *demise*, or in any other respect, the character of a lease.¹ And an assignee is personally liable to the lessor upon all covenants which run with the land; the premises also remaining liable to a distress for rent.²

§ 110. A lessee, on granting an under-lease, cannot fully protect himself from the consequences of a breach by the under-lessee, of the covenants contained in the original lease, by taking from him covenants corresponding to those contained in that lease, but must take a covenant of indemnity against such breach.³ And a prudent under-lessee will also stipulate for a clause to protect himself from paying any rent till his lessor produces the superior landlord's receipt for the chief rent; with a further provision, that, if the chief rent be not paid when due, the under-lessee may pay it to the superior landlord in discharge of his own rent.⁴

§ 111. No tenant can make an under-lease, which shall convey any interest exceeding his own in point of duration; and the demise of a tenant from year to year to hold from year to year will operate only during the continuance of his own tenancy.⁵ But the interest of an under-lessee cannot be defeated by the mesne lessee's surrendering his estate in the premises to the lessor; nor can the under-lessee's interest be determined by the original lessor's giving him a notice to quit. Such notice must be given, either by the lessor to his lessee or by the mesne lessee to the under-lessee.⁶ A tenant from year to year, who underlets from year to year, also acquires such a reversion as will entitle him to distrain for rent in arrear.⁷ If a tenant for a term of years, underlets part of the premises from year to year, and, at the expiration of the term, agrees with the lessor to hold on from month to month, in the absence of any new

¹ *Palmer v. Edwards*, 1 Doug. 187, n.; 2 B. & A. 168.

² *Hicks v. Downing*, 1 Ld. Ray. 99; *Parmenter v. Webber*, 8 Taunt. 598.

³ *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249. Thus in *Logan v. Hall*, 4 C. B. 598, a lessee who had covenanted to insure with a condition for re-entry on breach, demised to parties with a like covenant on their part; neither lessee nor sub-lessees insured, and the lessor re-entered and ousted the lessee. On suit by the lessee against the sub-lessees for the value of his reversion, the action was held not to lie, because he

had taken no covenant of indemnity; and the similar covenant given to the lessee by the sub-lessees did not cover breaches committed by him.

⁴ *Roe v. Harrison*, 2 T. R. 425.

⁵ *Pike v. Eyre*, 9 B. & C. 909; *Oxley v. James*, 13 M. & W. 209.

⁶ Co. Lit. 388, b; *Doe v. Pyke*, 5 Maule & S. 146; *Torriano v. Young*, 6 C. & P. 8; *Piggott v. Stratton*, 1 De Gex. F. & J. 88.

⁷ *Pleasant v. Benson*, 14 East, 284; *Curtis v. Wheeler*, 1 Mood. & M. 498; *Oxley v. James*, *supra*.

agreement between the tenant and under-tenant, the old tenancy will continue between them.¹

§ 112. A lease at will, from year to year, or for years, made by a tenant for his own life or that of another, unless authorized by an express power, must terminate on the death of the lessor in one case, or of the *cestui que vie* in the other; for no man can confer on another a larger estate than he himself possesses.² In New York, however, a tenant for life may, by virtue of a power granted to him by the owner of the fee, make leases, for not more than twenty-one years, to commence in possession during his life.³ But the lease of a mere tenant at will is void; having no certain interest to dispose of, the very act of letting to a stranger becomes a determination of his will. Neither can he surrender, any more than he can grant; for to surrender would be to determine his will and relinquish his estate.⁴

§ 113. As tenants for life cannot, unless by the aid of a statute, make leases to continue for a longer period than their own lives, it follows that, where a tenant by the curtesy or in dower makes a lease for years, it will be absolutely determined by his death, and no acceptance of rent, by the heir or the reversioner, can confirm it. Their lessees holding over, unless recognized by the succeeding owner as tenants from year to year, are merely tenants by sufferance.⁵ But if the remainder-man has encouraged an expenditure by the lessee on improvements, in confidence of his continuing tenant; or has suffered him to rebuild, and does not, by his answer, deny that he had notice of the lessee's proceedings, he will be precluded from controverting the lease.⁶ A subsequent accept-

¹ *Pierse v. Sharr*, 2 Mann. & R. 418.

² *Ex parte Smyth*, 1 Swanst. 855; *Symons v. Symons*, 6 Madd. 207; *Doe v. Butcher*, 1 Doug. 50; *Doe v. Archer*, 1 B. & P. 531; *Bowes v. E. Lond. Waterworks*, 3 Madd. 875; Co. Lit. 47, b.

³ 1 R. S. 733, § 87. This power is not assignable as a separate interest, but is annexed to the estate, and will pass, unless specially excepted, by a conveyance of such estate. If so excepted, it is extinguished. It may also be released by the tenant to any person entitled to an expectant estate in the lands, and will be thereby extinguished. *Ib.*, §§ 88, 89. A power given to a devisee for life, to lease for a life or lives, or for a term exceeding twenty-one years, is wholly void; and cannot be sustained on the supposition that it will be executed by making leases for not more

than twenty-one years; especially where such execution would render the life-estate worthless. *Root v. Stuyvesant*, 18 Wend. 257, 315.

⁴ *Moss v. Gallimore*, Doug. 238; *Sweeper v. Randal*, Cro. El. 156; *Birch v. Wright*, 1 T. R. 382.

⁵ Co. Lit. 47, b; *Rowe v. Huntington*, Vaugh. 80, 81; *Miller v. Manwaring*, Cro. Car. 397. So though the remainder-man acts as agent of the life-tenant in letting he is not estopped to recover the premises from the lessee on decease of the life-tenant during the term. *Page v. Wright*, 14 Allen, 182.

⁶ *Stiles v. Cowper*, 3 Atk. 692; *Jackson v. Cator*, 5 Ves. 688; *Dann v. Spurrier*, 7 Ves. 231; *Pilling v. Armitage*, 12 *id.* 78-85.

ance of rent, with an acknowledgment of a tenancy, may, however, amount to a new demise by the remainder-man, the lessee being a mere tenant at sufferance in the interval.¹ But, where the remainder-man or reversioner joins with the tenant for life in making a lease, it is good, and is considered, during the life of the tenant for life, as his lease, and the confirmation of the remainder-man or reversioner; and, after the death of the tenant for life, it is taken to be the lease of the remainder-man or reversioner, and the confirmation of the tenant for life.² It has been determined, however, that a lease executed by a tenant for life, in which the reversioner, who was then under age, was named a party, but did not execute it, was void on the death of the tenant for life; and that a subsequent execution of it by the reversioner did not make it good.³

SECTION V.

BY JOINT TENANTS AND TENANTS IN COMMON.

§ 114. The general rule, with respect to property held by joint tenants or by tenants in common, is, that neither can make a transfer of any thing more than his undivided interest; but either of them may grant leases of that interest for life, for years, or at will, or the several parties in interest may join and convey the entirety.⁴ If one joint tenant makes a lease of his moiety for years, and dies before the lessee's entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expires. And so one joint tenant may make a lease to commence after his death, and his co-tenant, if he survives, will be bound by it.⁵ It may here be observed, that the rules applicable to partnership property do not apply to real estate; and hence, when real estate is held by partners in trade, for the purposes of their business, they hold as tenants in common, and not as joint tenants.⁶

¹ *Doe v. Watts*, 7 T. R. 88; *Doe v. Morse*, 1 B. & Ad. 365.

² *Treport's case*, 6 Co. 14, b; 2 Prest. Conv. 141.

³ *Ludford v. Barber*, 1 T. R. 86.

⁴ *Anderson v. Tompkins*, 1 Brock. C. C. 456-468; *Massie v. Long*, 2 Ham. 287; *Putnam v. Wise*, 1 Hill, 224. Heirs-at-law take as tenants in common, 1 N. Y. R. S. 753, § 17. Devisees in their own right take as tenants in common, unless other-

wise declared. Executors or trustees take as joint tenants, *ib.* 727, § 44. Otherwise of legatees, *Putnam v. Putnam*, 4 Bradf. 308.

⁵ *Grute v. Locroft*, Cro. El. 287; *Whitlock v. Horton*, Cro. Jac. 91; Co. Lit. 163.

⁶ *Coles v. Coles*, 15 Johns. 159; *Balmain v. Shore*, 9 Ves. 500; *Thornton v. Dixon*, 3 Br. Ch. 199. There may, however, be a partnership in the use of land,

§ 115. If parceners, or joint tenants, join in a lease, there can be but one lease, for they have but one freehold; but if tenants in common join in a lease, it amounts to several leases of their several interests.¹ One joint tenant, or tenant in common, may make a lease of his part to his companion; and this gives him a right of taking the whole profits, when before he had but a right to the moiety thereof; he may contract with his companion for that purpose as well as with a stranger.² And where tenants in common join in a lease, reserving an entire rent, they may join in enforcing payment of it; but if there be a separate reservation to each, each must bring a separate action.³ If, however, tenants in common make several demises of their undivided shares, either by distinct instruments or by the same instrument, they must sever in an action; for a joint action can only be maintained on a joint demise.⁴ But if the action be upon a covenant, and the cause of action be one and entire, tenants in common, being covenantees, must join, although the covenant be with them, and each and every of them.⁵ If the cause of action be separate and distinct, tenants in common must sue severally, though the covenant be joint in terms; but the several interest and ground of action must distinctly appear, as in the case of covenants to pay separate rents to tenants in common, upon demises by them.⁶

§ 116. Where tenants in common concur in granting a lease, each of them usually demises, according to his respective estate

for farming or mining, where the law-merchant will apply and govern to the same extent as in ordinary mercantile transactions. But, in buying and selling the land itself, on the joint account of several, the land retains the character of real estate, and each associate contracts for himself. *Patterson v. Brewster*, 4 Edw. 352. To what extent there may be a partnership for buying and selling real estate merely, see *Sage v. Sherman*, 2 N. Y. 417. To constitute real estate partnership property, it must not only be purchased with the funds of the firm, but must be used for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561; and see *Otis v. Sill*, 8 Barb. 102; *Anderson v. Lemon*, 8 N. Y. 236.

¹ 2 Rol. Abr. 64; *Shep. Touch.* 268, n. 3.

² *Cro. Jac.* 88-611; *Keay v. Goodwin*, 16 Mass. 1. If a tenant in common hires of his co-tenant, and for a term occupies exclusively, he is not bound, at the expiration of the term, to abandon possession, nor to make partition and occupy only one-half, even though his co-tenant has

given him notice to quit: it is sufficient if he offers possession of half, and does no act to prevent his co-tenant from occupying with him. *Mumford v. Brown*, 1 Wend. 52.

³ *Powis v. Smith*, 5 B. & A. 850. Where one tenant in common receives the rents and profits, although it may be that the others have an equitable lien on his undivided portion of the premises therefor, yet, upon his death, they are primarily chargeable upon his personal estate. *Hannan v. Osborn*, 4 Paige, 336.

⁴ *Powis v. Smith*, 5 B. & A. 851. Tenants in common may maintain a joint action for rent due, under a sealed lease, of the joint estate, all the covenants in which are with them jointly; although, by an agreement annexed to the lease, and made part thereof, it is stipulated that half of the rent shall be paid to each. *Wall v. Hinds*, 4 Gray, 256.

⁵ *Slingsby's case*, 5 Co. 18, b; *Withers v. Bircham*, 3 B. & C. 254.

⁶ *Servante v. James*, 10 B. & C. 410.

and interest, the instrument containing one grant of the whole estate, with a separate render of rent to each of the lessors, and a separate covenant for the payment of rent. But as, under a lease in this form, the lessors must bring separate actions for their respective portions of the rent, it is better that the demise should be joint, with one render of the entire rent to the lessors simply, which will not prevent their taking it as tenants in common, the rent following the reversion, and a covenant for payment with them; in which case, they may join in an action of covenant or sue separately in debt, at their option.

§ 117. Mercantile law has, as we have already observed, somewhat modified this doctrine, when applied to copartnership interests. By the strict rules of the common law, one partner could not bind another by any instrument under seal, unless he had a previous express authority for the purpose; and such is still the law in Tennessee.¹ But this doctrine has been essentially relaxed in the more commercial states; where it is held that one partner, if in the presence of his copartners, may execute a deed for them, in a transaction in which they are all concerned.² And an absent partner may also be bound by a deed, executed on behalf of the firm by his copartner, provided there be either a previous parol authority, or a subsequent parol adoption of the act.³ While the Superior Court of the city of New York have enlarged the rule still further, and hold that one partner may execute, in the name of the firm, any instrument under seal which is necessary in the usual course of its business, and that it will be binding upon the firm, provided the partner has authority for that purpose; and that such authority need not be under seal, nor even in writing, nor specially communicated for the specific purpose; but may be inferred from the copartnership itself, or from such subsequent conduct of the copartner who did not join, as implies his assent to the act.⁴

¹ *Turbeville v. Ryan*, 1 Humph. 118; Penn. 285; *Grazebrook v. McCreddie*, 9 Harrison v. Jackson, 7 T. R. 207. Wend. 489.

² *Mills v. Barber*, 4 Day, 428; *Gerard v. Basse*, 1 Dal. 119; *Hart v. Withers*, 1

³ *Skinner v. Dayton*, 19 Johns. 518.

⁴ *Gram v. Seton*, 1 Hall, 262.

SECTION VI.

BY MORTGAGOR AND MORTGAGEE.

§ 118. It may happen that the lessor, at the time of making a lease, has no such interest in the premises as to entitle him to contract absolutely for the enjoyment of it. Thus mortgagors, after default in payment of the mortgage-money, having mere equitable interests in land, have strictly no estate which can be recognized in a court of law; for at common law, a lease, created by a mortgagor subsequent to the mortgage, or when made by a *cestui que trust*, cannot be set up in a court of law against the trustee or mortgagee.¹ In this respect, they are in the same situation as strangers, who have no interest, although they may be in possession; such leases, however, are held good as between the parties, by virtue of the contract.² As against all persons, except the mortgagee and those claiming under him, the mortgagor is still considered owner of the land so long as he remains in possession, with the power of leasing or conveying it, subject to the incumbrance.³ But a mortgagee, although in possession, cannot make a lease that will bind the mortgagor when he comes in to redeem.⁴

§ 119. A tenant under a lease made prior to a mortgage cannot be dispossessed by the mortgagee, unless by virtue of a proviso for re-entry, or non-payment of rent, or upon the non-performance of covenants; for the mortgagee, as assignee of the reversion, has no higher rights than the mortgagor.⁵ But, to secure to himself the benefit of the rent and covenants, a mortgagee should give the lessee notice of the mortgage, and require payment of the rent to himself; and at common law he is entitled as well to rent which has fallen due since the mortgage was made, and remains unpaid

¹ *Webb v. Russell*, 8 T. R. 398; *Keith v. Swan*, 11 Mass. 216; *Roe v. Lowe*, 1 H. Bl. 447.

² *Thorn v. Burton*, 1 Keb. 24.

³ *Willington v. Gale*, 7 Mass. 188; *Collins v. Torry*, 7 Johns. 278; *Blaney v. Bearce*, 2 Greenl. 182. As between a mortgagor and mortgagee, or a purchaser under a foreclosure of the mortgage, the owner of the equity of redemption is en-

titled to the rents which become due down to the period when the purchaser under the decree of sale becomes entitled to possession; and this right accrues upon the production to the occupant of the premises of the master's or sheriff's deed. *Clason v. Corley*, 5 Sandf. 447.

⁴ *Hungerford v. Clay*, 9 Mod. 1.

⁵ *Moss v. Gallimore*, Doug. 279; *Rogers v. Humphreys*, 4 Ad. & E. 299.

to the mortgagor, as to rent accruing due after notice; yet, until notice, the lessee is justified in paying rent to the mortgagor.¹

§ 120. The rights of a tenant, under a lease executed after a mortgage, stand upon different ground. A mortgagor in possession, according to English law, is regarded as a tenant at will to the mortgagee;² who, being the legal owner, is entitled at law to the immediate possession, and to the receipt of rent if the land is in lease; and he may enter upon the mortgagor at any time, even before default in payment of the mortgage-money, and eject him.³ The mortgagor, consequently, has no power of making leases that will bind such a mortgagee; and, when he collects rent, he is only to be considered as receiving it, in order to pay the interest which accrues on the mortgage, by an implied authority from the mortgagee, until he determines his will. Hence, tenants under leases made subsequent to a mortgage may strictly be treated as trespassers by the mortgagee, and ejected without notice.⁴ By giving notice to such a tenant to pay rent to him, a mortgagee does not make him his tenant; no such result will be produced, unless an attornment by the tenant, or something equivalent to it, takes place, for the express purpose of creating a new tenancy between the tenant and the mortgagee.⁵ And if he accepts such person as his tenant, he will, after such acceptance, only become tenant from

¹ *Moss v. Gallimore*, Doug. 279; *Russell v. Allen*, 2 Allen, 42; *Hutchinson v. Dearing*, 20 Ala. 798; *Clark v. Abbott*, 1 Md. Ch. 474; so *Trent v. Hunt*, 9 Exch. 14, and the mortgagor, if allowed to remain in, must distrain in the mortgagee's name.

² The mortgagor has been sometimes so designated, but only "when it was not very material to ascertain what his power and interest were, or to settle with any great precision in what respects he did and in what respects he did not resemble a tenant at will." *Woodfall, Landl. & T.* (9th ed.) 191. "He is only so *quodammodo*. Nothing is more apt to confound than a simile. When the court call a mortgagor a tenant at will it is barely a comparison. He is like a tenant at will." *Per* *Ld. Mansfield*, *Moss v. Gallimore*, Doug. 282. *Per* *Parke, J.*, *Pope v. Biggs*, 9 B. & C. 257. "He is not even a tenant at will to mortgagee;" *per* *Alderson, B.*, *Trent v. Hunt*, 9 Exch. 22.

³ *Doe v. Maisey*, 8 B. & C. 767; *Doe v. Giles*, 5 Bing. 421; s. c. 8 Mann. & R. 107; *Cro. Jac.* 659.

⁴ *Jackson v. Fuller*, 4 Johns. 216; *Keech*

v. Hall, 1 Doug. 21; *Rogers v. Humphreys*, 4 Ad. & E. 299.

⁵ *Evans v. Elliott*, 9 Ad. & E. 342. Accordingly where such notice was coupled with authority from the mortgagor to his tenant to pay mortgagee, and this was withdrawn after several payments had been made to mortgagee, it was held, the tenant could not deny his tenancy to mortgagor. *Wheeler v. Branscombe*, 5 Q. B. 378; but if the mortgagee had entered for condition broken, payment of rent by tenant would have made him mortgagee's tenant. *Doe v. Barton*, 11 Ad. & E. 307, 315. In *Wilton v. Dunn*, 17 Q. B. 294; *Hickman v. Machin*, 4 Hurlst. & N. 716; the mere notice and demand by mortgagee were held insufficient to protect the tenant from paying mortgagor, if he had not already paid mortgagee; and the doctrine of *Pope v. Biggs*, *supra*, and *Waddilove v. Barnett*, 2 Bing. N. C. 538, that rent in arrear, at the time of such notice, could be safely paid to the mortgagee, was doubted; and the *dictum* that such notice of itself makes the lessee mortgagee's tenant was denied and overruled in *Evans v. Elliott*, 9 Ad. & E. 342.

year to year to the mortgagee, although he may be in possession under a lease for years from the mortgagor.¹

§ 121. The common-law doctrine on this subject prevailed very extensively in the United States;² thus on a lease made prior to the mortgage, as the legal title vests at once by the mortgage,³ the mortgagee as assignee of the reversion is entitled by the statute, without attornment, to rent from the date of the mortgage, merely by giving notice, whether the same accrued prior or subsequent to the notice, if not already in good faith paid to the mortgagor.⁴ But no relation of landlord and tenant exists between mortgagee and mortgagor,⁵ or the tenant of the latter by a demise subsequent to the mortgage, and such tenant may be ejected like the mortgagor without notice to quit,⁶ and on entry or demand by the mortgagee may attorn and pay the after accruing rent to him;⁷ though in those States where the action of ejectment prevails, all rent accrued after the demise laid therein can be recovered by the mortgagee.⁸

§ 122. But the common-law rules of mortgages have been modified in many of the States, and the rights of the mortgagee to rent limited; thus, in Vermont, he has no legal estate until condition broken,⁹ in Pennsylvania, Michigan, Georgia, and South Carolina, only after foreclosure and sale;¹⁰ and in California, no estate at all

¹ Doe v. Bucknell, 8 C. & P. 566.

² Rockwell v. Bradley, 2 Conn. 1; Blaney v. Bearce, 2 Greenl. 182; Erskine v. Townsend, 2 Mass. 498; Odiorne v. Maxey, 16 id. 89; Simpson v. Ammons, 1 Binn. 175; McCall v. Lenox, 9 S. & R. 302. But see Jackson v. Green, 4 Johns. 186.

³ Blaney v. Bearce, *supra*; Erskine v. Townsend, *supra*.

⁴ Kimball v. Lockwood, 6 R. I. 189; Russell v. Allen, 2 Allen, 42; Mansony v. U. S. Bank, 4 Ala. 746; Baldwin v. Walker, 21 Conn. 168, 182.

⁵ 4 Kent, Com. 149; Doe v. Mace, 7 Blackf. 2, 4; Bank of Washington v. Hupp, 10 Gratt. 28, 42.

⁶ Doe v. Mace, 7 Blackf. 2; Rockwell v. Bradley, 2 Conn. 1; Babcock v. Kennedy, 1 Vt. 457.

⁷ Baldwin v. Walker, 21 Conn. 168; Stone v. Patterson, 19 Pick. 476; Welch v. Adams, 1 Metc. 494; Mass. H. L. I. Co. v. Wilson, 10 Metc. 126; Hills v. Jordan, 30 Me. 367; Cavis v. McClary, 5 N. H. 529. Though in New Jersey, only after actual entry, Sanderson v. Price, 1 Zab. 637; Price v. Smith, 1 Green, Ch. 516.

⁸ Babcock v. Kennedy, 1 Vt. 457; Bank of Washington v. Hupp, 10 Gratt.

28, 29; and see Turner v. Coal Co., 5 Exch. 932; Litchfield v. Ready, *ib.* 939. The doctrine advanced in Pope v. Biggs, 9 B. & C. 245, that mere notice by mortgagee would be a defence to tenant against suit by mortgagor for rent arrear as well as subsequent to such notice, is now overruled as to rent arrear; Wilton v. Dunn, 17 Q. B. 294; and rent subsequent, also, Hickman v. Machin, 4 Hurlst. & N. 716; In Bank of Washington v. Hupp, 10 Gratt. 28, 29, 48; notice by mortgagee was, on the authority of Pope v. Biggs, held sufficient to entitle him to all rents not paid the mortgagor, but this was a *dictum*, as to rent arrear, for all rents in this case were subsequent to the mortgage. Pope v. Biggs, was also followed in Hutchinson v. Dearing, 20 Ala. 798; and Clark v. Abbott, 1 Md. Ch. 474; and in Henshaw v. Wells, 9 Humph. 568, rent actually paid mortgagor was recovered back by mortgagee, because registration of the mortgage was notice to the tenant.

⁹ Babcock v. Kennedy, 1 Vt. 457; Cheever v. Rutland & B. R. R. 89 Vt. 658; query in Alabama, see Smith v. Taylor, 9 Ala. 683.

¹⁰ Myers v. White, 1 Rawle, 353; Ladue v. Detroit, 13 Mich. 394; Ragland v. Justices,

passes by the mortgage until foreclosure.¹ The common-law rules, however, apply in the New England States, Indiana, Missouri, North Carolina, Mississippi, and Minnesota.²

§ 123. In the State of New York, the Revised Statutes have abolished the action of ejectment by a mortgagee, thereby compelling him to rely upon a special contract for the possession, if he wishes it, denying his right to the rents and profits of the estate so long as the land is a sufficient security for his debt, and turning him over to the courts of equity for a foreclosure and sale as his only remedy. The mortgagee is only entitled to have a receiver of the rents and profits of the mortgaged premises, after it satisfactorily appears that the property is not of sufficient value to satisfy the mortgage debt and costs, and the mortgagor or other person, who is personally liable for the debt, is irresponsible, or unable to pay the expected deficiency. And where the defendant, in a suit to foreclose the mortgage, is in possession by his tenant, who is not a party to the suit, the possession of the tenant will not be disturbed by the appointment of a receiver of rents; but he may be ordered to attorn to the receiver and pay rent to him.³

§ 124. In Massachusetts, also, it is held that a mortgagor, so long as he remains in possession, or until actual entry by the mortgagee, may receive the rents and profits to his own use, and is not liable to account for them to the mortgagee.⁴ Nor is he

10 Ga. 65; *State v. Laval*, 4 McCord, 336.

¹ *Bullock v. Rogers*, 9 Cal. 123; *Polhemus v. Trainer*, 30 Cal. 685; and see Washb. Real Prop. (3d ed.) 99.

² But even here the mortgagee has no title to rent if and while he is restricted from possession by stipulation in the mortgage. *Smith v. Taylor*, 9 Ala. 633; so if mortgagor holds over. *Mayo v. Fletcher*, 14 Pick. 525.

³ *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Shotwell v. Smith*, 3 Edw. 588. The owner of the equity of redemption is at law entitled to the rents and profits of the mortgaged premises until the purchaser under the decree of foreclosure becomes entitled to the possession of the premises. If the accruing rent becomes payable between the day of sale and the time when the purchaser will be entitled to possession by the terms of the decree and the practice of the court, such rent belongs to the owner of the equity of redemption, and not to the purchaser at the master's sale. But

if the proceeds of sale are insufficient, or are probably insufficient, to pay the amount due on the mortgage, and the mortgagor or other person who is personally liable for such deficiency is insolvent, the plaintiff is, at any time, entitled to a receiver to collect the rent, and have it applied to the payment of the deficiency. *Astor v. Turner*, 11 Paige, 486; *Howell v. Ripley*, 10 Paige, 43. After the sale, a tenant in possession, who was made a party to the suit is bound to attorn to the purchaser, notwithstanding he holds under an unexpired lease executed by the mortgagor prior to the mortgage; and if he refuses, may be removed by a writ of assistance. And it is not material that the original lessee from whom the lease came by assignment to the tenant in possession, was not made a party to the foreclosure. *Lovett v. The German Reformed Church*, 9 How. Pr. R. 220.

⁴ *Boston Bank v. Reed*, 8 Pick. 459; *Gibson v. Farley*, 16 Mass. 280. A mortgagee who took possession before foreclose-

liable even for such as may accrue between the time of the commencement of the action to foreclose, and the time of taking possession upon execution.¹ So, if a person demise an estate for a term of years, reserving rent, and afterwards mortgage the same estate to the lessee in fee, and the mortgagee refuses to pay rent, the rent is suspended until the condition is performed or the estate redeemed. During the suspension, the lessee will be accountable for the profits, as mortgagee, towards the discharge of the interest and principal of the debt. If he voluntarily pays the rent, he will not afterwards be accountable, as mortgagee, for the profits during the same time.² We may observe, also, that a lessee, or his assignee, may always, in order to protect the estate, redeem a mortgage, covering the premises, given by the lessor, prior to the lease; and it makes no difference, if the leasehold premises consist of but a part of the lands covered by the mortgage.³

§ 125. From the foregoing observations, it is obvious that a permanent lease of lands under mortgage can only be secured by the concurrence of both the mortgagor and mortgagee, the former to *demise and lease*, the latter to *ratify and confirm*. Such a lease operates during the continuance of the mortgage as the demise of the one and the confirmation of the other; but, after the mortgage is paid off, as the demise of the latter and confirmation of the former.⁴ Where both concur in the grant, the covenants on the lessee's part should be entered into with the mortgagee, with a view to their running with the land. If entered into with the mortgagor they are merely covenants in gross, and of no value to an assignee of the mortgage.⁵ A mortgagor cannot enforce a specific

ure was required to account for the rents and profits received, or for a fair cash rent. *Van Buren v. Olmstead*, 5 Paige, 9.

¹ *Mayo v. Fletcher*, 14 Pick. 525. And in a case arising in Massachusetts, where the rent was payable in advance, and the mortgagee took possession, after condition broken, as he had a right to do by the statutes of that Commonwealth, upon the first day of the quarter in which the rent was payable, the court held, that, inasmuch as the tenant had the whole of the day to make the payment in advance, and the mortgagee entered on that day and ousted him, the tenant had a sufficient excuse for not paying the rent to the mortgagor. *Smith v. Shepard*, 15 Pick. 147.

² *Newall v. Wright*, 3 Mass. 138.

³ *Averill v. Taylor*, 8 N. Y. 44. Upon

the redemption, the redeeming party has a right to an assignment of the mortgage redeemed; and, if it be recorded, a right to require the mortgagee to acknowledge the assignment.

⁴ *Doe v. Adams*, 2 Cr. & J. 232; s. c. 2 Tyrw. 239.

⁵ *Webb v. Russell*, 8 T. R. 393; s. c. *ib.* 679; 1 H. Bl. 562. Thus on a lease by mortgagor and mortgagee reciting the mortgage and reserving rent, re-entry for non-payment thereof to the mortgagor, lessee is not estopped to deny mortgagor's title in an action of ejectment for breach of condition to pay rent, brought by the assignee of mortgagor and mortgagee. *McAreavy v. Hannan*, 13 Irish Com. L. 70; So *Saunders v. Merryweather*, 13 W. R. 814.

performance of a contract to take a lease, without first redeeming the mortgage, or obtaining the mortgagee's concurrence in the lease; though a party claiming under such a contract cannot compel the mortgagor to pay off the mortgage, to give effect to the lease.¹

SECTION VII.

BY CORPORATIONS.

§ 126. Every corporation aggregate² has, unless specially restrained by its charter or by statute, a common-law right to hold, enjoy, and transmit such property as may be necessary to enable it to answer the purposes of its creation;³ it may, consequently, make leases for a term of years, or for the life of the lessee, or at will, to the same extent that an individual may, provided they be not inconsistent with its corporate rights and responsibilities.⁴ As a general rule, it must grant as well as take by its corporate name; but an immaterial variance in the name will not avoid its grant, when the true name is necessarily to be collected from the instrument, or is shown by proper averments;⁵ and the same principles are applicable to the granting of a term for years, as of the fee.⁶

¹ *Costigan v. Hastler*, 2 Sch. & L. 160.

² A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members, for the time being, one artificial person, or legal being, capable of transacting some kind of business, like a natural person. Per *Bronson, C. J.*, in *The People v. The Assessors, &c.*, 1 Hill, 620.

³ *People v. Utica Ins. Co.* 15 Johns. 383; *McCartee v. Orphan Asylum*, 9 Cow. 437; *The Mayor, &c., v. Lowten*, 1 Ves. & B. 226-240. This common-law right has been restricted in England since the time of Elizabeth, as to religious corporations; and such restraining acts have been generally followed in this country. In the State of New York, it is well understood that no religious corporation can sell in fee any of its real estate without an order of the Supreme Court; but they are expressly authorized by statute to demise, lease, and improve the same for the use of the congregation. This limitation of

the corporate power to sell, is confined to religious corporations; but all others can buy and sell at pleasure, except so far as they may be specially restricted by their charters. 2 Kent, Com. 281.

⁴ *Reynolds v. Comm'rs*, 5 Ham. 205; Co. Lit. 44, a. And see *Curtis v. Leavitt*, 15 N. Y. 9, 62, 219, 262. But if a mode of exercising the leasing power is prescribed, this must be strictly followed or the lease is void. *Taylor v. Beebe*, 8 Rob. N. Y. 262; *Ready v. Mayor*, 20 N. Y. 312.

⁵ That the misnomer of a corporation, whether grantor or grantee, does not vitiate the grant, provided the identity of the corporation with that intended by the parties to the instrument appears; see *N. Y. Inst. for the Blind v. How's Ex'ors*, 10 N. Y. 84; *Sutton v. Cole*, 8 Pick. 237; *Minot v. Curtis*, 7 Mass. 444; *Chancellor, &c., of Oxford*, 10 Co. 57. The name of the corporation need not be *idem syllabis aut verbis*: it is sufficient that it be *idem re et sensu*. *The Mayor, &c., of Lynn*, 10 Co. 124.

⁶ *Angell & Ames on Corp.* 60; *N. Y. African So. v. Varick*, 13 Johns. 38; *Berks*

§ 127. A corporation at common law could do no act, except by writing, under its corporate seal; but this doctrine has been greatly relaxed by recent decisions in England,¹ and is now entirely repudiated in the United States. The Supreme Court of the United States, in common with the State courts, hold, that whenever a corporation aggregate is acting within the scope of the legitimate objects of its institution, all parol contracts made by its authorized agents, are binding upon it;² and that a bank or other commercial corporation, may bind itself, by a vote of its board of directors, or by the acts of its authorized officers and agents, without the corporate seal.³ The modern decisions, in fact, place corporations with regard to their mode of making contracts, upon the same footing with natural persons. They may contract under seal, but are no otherwise obliged to do so than are individuals. Like these, they are subject to the rules established by law, and cannot take or grant certain interests in land, otherwise than by deed, when similar interests can only be so taken or granted by individuals. Corporations, therefore, may now make parol leases, in the same manner and under the same restrictions that natural persons may.⁴

§ 128. The board of directors are, for all business purposes, the corporation; and they may authorize a committee or an officer, to lease, or otherwise dispose of, its real estate; and that power implies an authority to affix the corporate seal, if necessary or proper.⁵ The Revised Statutes of New York, relating to

&c. Co. v. Myers, 6 S. & R. 12; Inhab. Al-
loway Cr. v. String, 5 Halst. 322; Sutton v.
Cole, *supra*. It should be noted here that
a mere community of individuals, not in-
corporated, cannot take real estate in
succession, and therefore, under a grant of
three persons named, for themselves and
their associates, being a settlement of friends
at, &c., to have and to hold as tenants in
common for themselves and their asso-
ciates, the estate rests only in the three
persons named. Jackson v. Sisson, 2
Johns. Cas. 321; Co. Lit. 8, a; Jackson
v. Cory, 8 Johns. 885; Hornbeck v.
Westbrook, 9 Johns. 73.

¹ East Lond. Water Works v. Bailey, 4
Bing. 283.

² Bank of Columbia v. Paterson, 7
Cranch, 299; Buffalo Com. Bank v. Kort-
right, 22 Wend. 348; Kelley v. The Mayor,
4 Hill, 263.

³ Fleckner v. The U. S. Bank, 8 Wheat,

838; Mott v. Hicks, 1 Cow. 518; Chestnut
Hill Co. v. Rutter, 4 S. & R. 16; Danforth
v. Schoharie, &c. Co. 12 Johns. 227.

⁴ Per Marshall, C. J.; Bank of U. S. v.
Dandridge, 12 Wheat. 105; Osborn v. U.
S. Bank 9 *id.* 738; Garvey v. Colcock, 1
Nott. & McC. 281. Lay corporations, by
the laws of New York, are restricted from
granting or accepting leases, except so far
as the purposes of the corporation shall re-
quire, or their charter may authorize. 1 R.
S. 599. Religious incorporations also are
only authorized to make leases for the
use of the society or other pious uses.
Act 5 April, 1818, sess. 36, ch. 60 § 4.

⁵ Burrill v. Nahant Bank, 3 Metc. 163;
Decker v. Freeman, 3 Greenl. 338. A
corporation can only act in the mode pre-
scribed by the law creating it. Beatty v.
Marine Ins. Co., 2 Johns. 109; 2 Cranch.
166. And where a charter declared that
the president and one-third of the directors

the general powers of corporations provide that when the corporate powers of any corporation are directed by its charter to be exercised by any particular body or number of persons, if it be not otherwise provided in the charter, a majority of such body or persons shall be a sufficient number to form a board for the transaction of business; and every decision of a majority of the persons duly assembled as a board, shall be valid as a corporate act.¹ It may be almost unnecessary to observe, that a corporation may accept, and will be bound by a lease, in all cases where the contract is within the scope of its corporate authority. And where a corporation entered upon and enjoyed premises pursuant to a lease purporting to be made by its agent, and paid rent thereon, it was held bound by the lease; and that the authority of the agent to contract for it could be proved as well by a subsequent ratification of his acts as by direct evidence of his appointment.²

§ 129. Although a corporation may execute parol leases without the use of the corporate seal, its seal is still necessary, as we have observed, in all cases where a seal would be required if the instrument were to be executed by an individual. But the corporate seal, when affixed to a contract or conveyance, does not render the instrument a corporate act, unless it is affixed by an officer or agent duly authorized to execute the instrument, or acting in pursuance of a vote of the board of directors of the company.³ In order to authenticate the instrument, it will be necessary to prove the corporate seal in the same manner as the seal of an individual; for the common seal is not evidence of its own authenticity, but must be proved to be such, not indeed by one who saw it affixed, but by one who knows it to be the seal of the corporation it purports to be.⁴ When the seal is affixed to the deed, it is *prima facie* evidence that it was affixed by the authority of the corpora-

should constitute a quorum for the transaction of business, and that all business might be transacted by committees, without the presence of the board, it was held that the president alone had no power to act. *Dawes v. North River Ins. Co.*, 7 Cow. 462.

¹ 1 N. Y. R. S. 600, § 6. Where two trustees, being a corporation, signed their names separately to a lease, and affixed the corporate seal separately to each of their names, it was held to be well executed. *Jackson v. Walsh*, 8 Johns. 226.

² *Long Isl. R. R. v. Marquand*, 6 N. Y.

Leg. Obs. 160; and see *Hoyt v. Thompson*, 19 N. Y. 207.

³ *Jackson v. Campbell*, 5 Wend. 572; *Bank of U. S. v. Dandridge*, 12 Wheat. 68; *Derby Canal Co. v. Wilmot*, 9 East, 860.

⁴ *Jackson v. Pratt*, 10 Johns. 381; *Foster v. Shaw*, 7 S. & R. 156; *Dan v. Vreelandt*, 2 Halst. 352. In New York, the seal of a corporation may be affixed by making an impression directly on the paper, and the legal effect will be the same as if made on wax or a wafer. *Laws of 1848*, p. 305.

tion ; provided it is also proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal. And it lies with the party objecting to the due execution of the deed, to show that the corporate seal was affixed surreptitiously or improperly ; and that all the preliminary steps to authorize the officer having the legal custody of the seal to affix it to the deed, have not been complied with.¹

SECTION VIII.

BY TRUSTEES.

§ 130. Trustees of lands, being the owners of the legal estate, may grant leases which cannot be impeached so long as they are justified by the quantity of the estate they possess. If there are several trustees, all must act ; one cannot act separately and independent of the others, for they have a joint authority only, and therefore the lease of one of several trustees is entirely void.² A party taking a lease from trustees with notice of the trust, and without the concurrence of the person who is beneficially interested, is subject to the control of a court of equity. The lessee of a *cestui que trust*, however, acquires no interest without the concurrence of the trustee ; he is, in fact, a mere trespasser as against the trustee, and is liable to an eviction at law without any previous notice to quit.³ It is, therefore, expedient, as in the case of a mortgagor and mortgagee, that the trustee and *cestui que trust* should both join in a demise.⁴ If there be several *cestuis que trust*, the concurrence of all is necessary ; for, if a trustee under a will concur with some, but not all of them, in a lease which recites part only of the trust, the lessee cannot hold in opposition to the other *cestuis que trust*, who are not parties to the lease, such a recital rendering it incumbent on him to make further inquiry, and he is to be considered as having had notice of the title of the other claimants under the will.⁵ The rent may be reserved generally

¹ Lovett v. Steam Saw-mill Co., 6 Paige, 54 ; Clarke v. The Imperial Gas Co., 4 B. & Ad. 315.

² Sinclair v. Jackson, 8 Cow. 543 ; Story's Eq. Jur., § 1062.

³ Blake v. Foster, 8 T. R. 487, 492.

⁴ The trustee should *demise and lease*, and, on the part of the *cestui que trust*, words of demise should be inserted as well as words of *consent and approbation*.

⁵ Malpas v. Ackland, 8 Russ. 278.

during the term, without specifying to whom it is to be paid, leaving the law to give it its due appropriation ; but the covenants, to make them run with the land, should be entered into with the trustee.¹

§ 131. Trustees, holding the fee, may, as we have said, make valid leases of the estate they represent ; indeed a due execution of the trust usually requires them to exercise this power. The duration of such leases must, however, be for a reasonable period, under the circumstances of each particular case ; but they may extend beyond the period of the trust estate, subject to the jurisdiction of a court of equity to annul them if unreasonable or improper. In one case, where a testator devised his real estate to trustees, upon trust, out of the yearly rents and profits, to pay certain annuities, and, subject thereto, to permit a person to receive the rents and profits for life, and, after his decease, to permit his wife to receive them for her life, with limitations over in favor of their children, the trustees were held to have power to demise for ten years.² So a trust created by will to receive the rents and profits of unoccupied and unincumbered real estate, liable to large taxes and assessments, for the lives of the testator's children and out of the same to uphold, support, repair, &c., and pay all charges on the land, was held to authorize a lease for twenty-one years, with a covenant to renew or to pay for buildings to be erected by the lessee.³ But with reference to a devise to A. in fee, in trust for his infant son, to be conveyed to him at the age of twenty-one, and, without imposing terms upon the trustees as to the rent, or the length or terms of lease, Lord Eldon held, that, although the trustees might do what was reasonable, they clearly could not alienate the land for ninety-nine years at a stationary rent.⁴

§ 132. Whatever may be the term for which the lease is granted, the burden of proving its reasonableness devolves on the trustee, and the lessee claiming under him. The principle upon which a court of equity will interfere with leases made by a trustee, rests on a presumption that the lessor has been guilty of a breach of trust in making, and the lessee has made himself accessory to that breach of trust in accepting, an improper lease. Thus a suspicion of mismanagement will attach to a lease made for a long

¹ *Webb v. Russell*, 3 T. R. 398 ; s. c. 1 H. Bl. 562.

² *Greason v. Keteltas*, 17 N. Y. 491.

³ *Naylor v. Arnitt*, 1 Russ. & M. 501 ;

⁴ *The Attorney-General v. Owen*, 10 Ves. 555, *supra*.
Ves. 555-560.

term of years absolute, at a stationary rent, because no man of a reasonable degree of prudence would so let his own estate:¹ therefore it is said, that, generally speaking, an alienation by trustees for ninety-nine years, if a mere husbandry lease, and without adequate consideration;² or a lease for seventy years or more, at an unvarying rent (the value of such interests being but little inferior to the value of the inheritance), and no other consideration than the rent forming an inducement to the contract,—cannot be upheld.³

SECTION IX.

BY EXECUTORS AND ADMINISTRATORS.

§ 133. Executors who hold the legal estate may demise the premises which devolve upon them by the will of their testator, even before probate; but administrators can only act under an order made by the authority of the court which appointed them.⁴ Both executors and administrators, however, have an absolute power over the terms of the testator or intestate, and may either assign or lease them, the rent being assets in their hands.⁵ Several executors are regarded as an individual person, and have a joint and several interest in the testator's property; the lease of one executor is therefore as valid as their joint demise would be, although it purports to be in the name of all.⁶ The husband of a woman who is an executrix has, at common law, a joint interest with her, in all the effects of the deceased, and may assume the whole administration, and act in it for all purposes, without her consent; but the wife cannot do any act as executrix or administratrix without her husband's concurrence. She is, therefore, with respect to terms for years, which she possesses in her representative character, in no better situation during the marriage,

¹ *Att'y-Gen. v. Cross*, 3 Mer. 524; *Att'y Gen. v. Brooke*, 18 Ves. 826.

² *Att'y-Gen. v. Owen*, 10 Ves. 555;

Att'y-Gen. v. Hotham, 1 Turn. & R. 209;

Att'y-Gen. v. East Ind. Co. 11 Sim. 380.

³ *Att'y-Gen. v. Griffith*, 13 Ves. 575;

Att'y-Gen. v. Backhouse, 17 Ves. 290;

Att'y-Gen. v. Warren, 2 Swanst. 304;

Att'y-Gen. v. Foord, 6 Beav. 288.

⁴ *Bank of Hamilton v. Dudley*, 2 Pet.

492; *Roe v. Summerset*, 2 W. Bl. 692;

1 Atk. 461. In Missouri, an executor may

make leases for not exceeding three years. Stat. of 1843, 3, 4. In Alabama, he must let at auction. Clay, 199.

⁵ *Bac. Ab. Leases*, I. 7. And rent on such lease goes to the executor of the administrator and not to intestate's representative. *Drew v. Bayly*, 2 Lev. 100.

⁶ *Simpson v. Gutteridge*, 1 Madd. 616; *Bedell v. Constable*, Vaugh. 179; *Roe v. Hodgson*, 2 Wils. 129; *Beaufort v. Berty*, 1 P. Wms. 702; *Doe v. Sturges*, 7 Taunt. 217.

than in the case of terms for years to which she is entitled in her own right.¹

§ 184. It is said, that leases by executors or administrators, though good at law, are voidable in equity, unless shown by the lessees to be a due administration of the assets of the testator or intestate; an under-lease granted by an administratrix was consequently set aside, where the lessee had notice that a sale was not required by the parties beneficially interested.² A person taking from an executor a lease of premises specially bequeathed to another, should therefore, if possible, obtain the concurrence of the legatee; for, after the executor's assent to the bequest, the legal title vests in the legatee, at whose suit an action of ejectment will lie against the purchaser.³

SECTION X.

BY GUARDIANS.

§ 135. Guardians of infants, who were in the nature of guardians in socage, might, at common law, demise the infant's lands for a term of years, not extending beyond the infant's age of fourteen years.⁴ And such demises might be in the guardian's own name, and without leave of the court; for he had not merely a bare authority, but an interest in the land descended. But a term extending beyond that period was voidable, provided the infant was then entitled to choose his own guardian; and it might be avoided or affirmed by a subsequent guardian chosen by the infant.⁵ The common-law distinctions of guardians have, however, in this country, been essentially superseded in practice, by guardians appointed by the courts of chancery or of probate; who, as well as testamentary guardians, are vested with all the rights of a guardian in socage during the whole of an infant's minority.⁶

¹ Chamb. on Leases, 85.

² Drohan v. Drohan, 1 Ball & B. 185; Evans v. Jackson, 8 Sim. 217.

³ Paramour v. Yardley, Plowd. 589; Westwick v. Wyer, 4 Co. 28, b; Doe v. Guy, 3 East, 120. So Fenton v. Clegg, 9 Exch. 680.

⁴ Doe v. Hodgson, 2 Wils. 129; Bacon v. Taylor, Kirby, 368.

⁵ Shopland v. Ryoler, Cro. Jac. 55-98;

Jones v. Brewer, 1 Pick. 814; Snook v. Sutton, 5 Halst. 138; Van Doren v. Everitt, 2 South. 460.

⁶ Byrne v. Van Hoesen, 5 Johns. 66; Field v. Scheffelin, 7 Johns. Ch. 154. They, accordingly, not merely may but must lease the ward's land and are accountable for losses from omitting so to do. Hughes Minors' Appeal, 58 Pa. St. 500; Campau v. Shaw, 15 Mich. 228.

And it is now well understood that his authority continues until the majority of his ward, and is not controlled by the election of the infant when he arrives at the age of fourteen.¹

SECTION XI.

BY COMMITTEES AND RECEIVERS.

§ 136. The committee of a lunatic, being at first considered merely as a bailiff, and having therefore no estate but during pleasure, could not make leases of the lunatic's lands without an express order of the court appointing them.² And even the court could not enable him to grant an absolute interest, or one that the lunatic, on his recovery to a healthy condition of mind, might not terminate.³ But the statutes of England, as well as of the various United States, now authorize such committees to make specific leases, independent, in point of duration, of the lunatic's restoration to sanity. It is customary also for courts to make orders for the appointment of a receiver, for the protection, care, and management of the estates of suitors pending a litigation before them. And in all these cases, the rules and orders of the courts, constitute the law for the governance of such committees as well as receivers, who are, in fact, regarded simply as officers of the court appointing them.⁴

¹ *Matter of Nicoll*, 1 Johns. Ch. 25; *Matter of Dyer*, 5 Paige, 534; *Putnam v. Ritchie*, 6 Paige, 390; 2 R. S. 151; § 10. In Massachusetts, South Carolina, and Maryland, it has been expressly held, that the father, as natural guardian of an infant, has no authority to make a lease of the infant's land. *May v. Calder*, 2 Mass. 55; *Anderson v. Darby*, 1 Nott & McC. 369; *McGruder v. Peter*, 4 Gill & J. 328. A lease for a longer period than the infancy of the ward is void. *Ross v. Gill*, 4 Call, 250.

² *Foster v. Merchant*, 1 Vern. 262; *Knipe v. Palmer*, 2 Wils. 130; *Brooks v. Brooks*, 3 Ired. 389. A mere bailiff cannot lease his employer's lands otherwise than at will; but a power may be conferred on him for that purpose. *Shopland v. Ryoler*, Cro. Jac. 55, 98.

³ *Ex parte, Dikes*, 8 Ves. 79.

⁴ A general rule of the Supreme Court of New York — Rule 92 — authorizes a receiver, who is appointed by the court, to receive and collect all dues, demands, and rents payable to the debtor; and he may, without any special order of the court, make leases, from time to time as may be necessary, for a term not exceeding one year. He may also apply for and obtain an order of course, that the tenants attorned to and pay their rent to him. But a receiver of the property of a judgment debtor, appointed in pursuance of proceedings supplementary to an execution, becomes vested with the title of the debtor by virtue of his appointment, and may maintain all actions incidental to a reversionary estate in the land. *Porter v. Williams*, 9 N. Y. 142.

SECTION XII.

BY AGENTS.

§ 137. A lease may, as we have observed, be executed by an authorized agent, as well as by the landlord himself. According to the Touchstone, "if an agent have a letter of attorney, or other authority, he may make leases for another, but herein caution must be had of three things: 1. That the authority be good; 2. That he, that is the attorney, do pursue the authority strictly; 3. That he do it in the name of his principal, and not in his own name."¹ As to the persons who may act as agents, there seems to be little or no restriction; one may, in fact, act as the agent of another, who is disqualified from acting on his own account; as an infant, a married woman, or an alien.² His authority may be shown as well by a subsequent ratification, or an adoption of his acts by the principal, as by an original appointment.³ An appointment is *directly* proved by express words of appointment, either verbally or in writing. It may be *indirectly* established, by proof of the relative situation of the parties, or of their habit and course of dealing and intercourse, or from the nature of the employment, or from subsequent ratification.⁴ An agent appointed to contract for the granting of a lease need not be authorized in writing, under the statute of frauds; for, to constitute a valid executory agreement, relating to lands by an agent, it is only necessary that the agent be lawfully authorized to make the contract.⁵ But an appointment under seal is generally necessary where his authority extends to the execution of a lease under seal, or to the demise of any incorporeal hereditament, which cannot be granted otherwise than by

¹ Shep. Touch. 270; Combe's case, 9 Co. 76.

² Co. Lit. 52, a; Hopkins v. Mollineaux, 4 Wend. 465; Chastain v. Bowman, 1 Hill (S. C.), 270; Gove v. Buzzard, 4 Leigh, 281.

³ Townsend v. Inglis, Holt, N. P. 278; Haughton v. Ewbank, 4 Campb. 88, and the ratification relates back to the original transaction. Lawrence v. Taylor, 5 Hill, 118; Frost v. Deering, 21 Me. 156.

⁴ Story on Agency §§ 239-260. A principal is responsible for the acts of his agent, not only where he has actually given authority to the agent thus to represent and

act for him, but where he has, by his words, or his acts, or both, caused or permitted the person with whom the agent deals, to believe him to be clothed with this authority; and a man may thus be held liable as a principal, because he has in some way justified all persons in believing that he has constituted some other person his agent. 1 Pars. Cont. 134.

⁵ Clinan v. Cooke, 1 Sch. & L. 22, 31; Boyland v. Warner, 1 Hayes & J. 79, 88; Turnbull v. Trout, 1 Hall, 386; McComb v. Wright, 4 Johns. Ch. 667; Lawrence v. Taylor, 5 Hill, 107; Yerby v. Grigsby, 9 Leigh, 387.

deed;¹ and in cases where written authority to the agent may not be sufficient to give validity to the deed in a court of law, for want of a seal, equity will compel the principal to ratify and confirm the deed.² If the deed, however, is executed in the presence of the principal, and at his request, no other authority to the agent is necessary.³ A power of attorney does not admit of delegation to another, unless it contains a power of substitution; for *delegatus non potest delegari*.⁴ And, whenever it is necessary to record a lease, the power must be recorded also.⁵

§ 138. Supposing the agent to have authority, an agreement for a lease, as well as a lease executed in pursuance of an agreement, will effectually bind the principal, and if the person, at the time of entering into such an agreement, is acting as the agent of another in negotiating a lease, it is not material whether, at that moment, he intends the agreement to be for the benefit of his principal or his own; because, in either case, the principal will be entitled, as against him, to the benefit of the contract.⁶ And, although the authority of an agent must, in general, be strictly pursued, yet there are cases where his acts have been sustained when he has exceeded his authority;⁷ as if, having power to lease for ten years,

¹ Blood v. Goodrich, 9 Wend. 68; Horsley v. Rush, cited 7 T. R. 209; White v. Cuyler, 6 T. R. 176; Cooper v. Rankin, 5 Binn. 613; Plummer v. Russell, 2 Bibb, 174; Banorgue v. Hovey, 5 Mass. 40; McWhorter v. McMahan, 10 Paige, 886; Per Chancellor Walworth; it is insisted by the appellant's counsel, that, to constitute a lawfully authorized agent to make the contract, he must have written authority. Such, however, is not the construction which had been put upon the former statute of frauds; and the Revised Statutes have not changed the law in this respect. The law of 1818 required conveyances and leases which were to transfer an interest in lands *in presenti*, to be signed by the party, or his agent lawfully authorized in writing. But in the Revised Statutes, the words *by writing*, are left out, so that it is only necessary the agent should be lawfully authorized. Under this section, and the corresponding provision in the English statute of frauds, it had long been settled that to make a valid executory contract for the sale of lands, or an interest therein, it was not necessary that the authority of the agent should be in writing but only that the agreement itself should be in writing, and should be signed by him as such agent. 1 Sugd. Vend. 186,

10th Lond. Ed.; Clinan v. Cooke, 1 Sch. & L. 29. To the same effect is the case of Champlin v. Parish, 11 Paige, 406.

² Harrison v. Jackson, 7 T. R. 207; Story on Agency, § 49. An agent cannot bind his principal by deed unless he has authority by deed so to do. Hanford v. McNair, 9 Wend. 54.

³ Gardner v. Gardner 5 Cush. 488; Wood v. Goodridge, 6 id. 120.

⁴ Combe's case, 9 Co. 75, b.

⁵ Stewart v. Hall, 3 B. Mon. 220.

⁶ Taylor v. Salmon, 4 Myl. & C. 184; Lees v. Nuttall, 1 Russ. & M. 53; s. c. 2 Myl. & K. 819.

⁷ Batty v. Caswell, 2 Johns. 48; Fenn. v. Harrison, 3 T. R. 757; Munn v. Comm. Co. 15 Johns. 44; Pickering v. Busk, 15 East, 88; Gordon v. Buchanan, 5 Yerg. 71. In general, an authority must be strictly pursued in order to bind the principal; but, whatever may be the form or manner, it will bind the principal if such be the certain and obvious intention of the parties. The authority must be strictly followed, in all matters of substance; but the whole instrument will be considered, in order to ascertain the intention of the parties and the extent of the authority. Pars. Merc. Law. 145; Long v. Colburn, 11 Mass. 97; Townsend v. Hubbard, 4 Hill, 357.

he makes a lease for twenty; it is good for the ten years, because so far it is a good execution of his power, and will be supported in equity;¹ though at law, according to an English decision, it would seem not to be good *pro tanto* even for the ten years.² But an acquiescence of the principal, after knowledge of the act done for him by another, will generally be considered sufficient evidence of a ratification of such act.³

§ 139. Another general rule, with regard to the execution of an authority, is, that an act done under a power of attorney must be done in the name of the person who gives the power, and not in the attorney's name; and, if it appears from the deed that the seal is in fact the seal of the agent, and not of the principal, the latter cannot be made liable upon any covenant contained in it, nor will the instrument pass any estate or interest of the principal. Thus, where a deed, purporting to have been made between A., by B., his attorney of the one part, and C. of the other part, stated in the attestation clause that B., as the attorney of A., had set his hand and seal thereto, it was held not to bind A., for the addition of the word "attorney" is merely descriptive.⁴ But if the execution of a deed really appears to be in the name and on account of the principal, the form of words used in the execution of it is not material; thus it has been held sufficient, where opposite the seal was written, "for S. B. (the principal), by C. D. (the attorney.)"⁵

§ 140. A distinction is also to be observed between a bare act, as the execution of a deed, and the making of a contract, in which latter case the phraseology is material; for if a man describes himself in the beginning of an agreement to grant a lease, as making it on behalf of another, and as his agent, but in a subsequent part of the same agreement says *he* will execute the lease, the agent himself becomes personally liable; while a lease made by an attorney in his own name, even if he describes himself to be the agent or attorney of his principal, together with the covenants to pay

¹ Sugg. Pow. 545; Perry v. Bowen, 11 S. & R. 126; Harper v. Hampton, 1 Har. & J. 622.
² Nels. 87; Alexander v. Alexander, 2 Ves. 644; Campbell v. Leach, Ambl. 740.

³ Roe v. Prideaux, 10 East, 158.

⁴ Amory v. Hamilton, 17 Mass. 103; Kingman v. Pierce, *ib.* 247; Wilks v. Back, 2 East, 142; Bogart v. Debussy, 6 Johns. 94; Fowler v. Shearer, 7 Mass. 19; Hop-

kins v. Mehaffy, 11 S. & R. 126; Harper v. Hampton, 1 Har. & J. 622.

⁵ Townsend v. Hubbard, 4 Hill, 851; Berkeley v. Hardy, 5 B. & C. 355; Elwell v. Shaw, 16 Mass. 42.

⁶ Wilks v. Back, 2 East, 142; Spencer v. Field, 10 Wend. 87; Mussey v. Scott, 7 Cush. 215.

rent, are void.¹ But the attorney is not bound, even though he had no authority to execute the deed, if it appears on the face of it to be the deed of the principal.² Whenever, therefore, an interest is intended to pass by an instrument of lease, it must appear, in terms to be conveyed by the principal, in whom alone the interest is vested; for a power of attorney, as such, vests no interest in the representative, consequently none can pass from him.

§ 141. The proper form for concluding a lease, executed under a power of attorney, is: *In witness whereof, A. B., in pursuance of a letter of attorney hereunto annexed, bearing date, &c.* (or, if it is a general power embracing other lands, then "*in pursuance of a letter of attorney, bearing date, &c., a copy of which is hereto annexed*") *hath set the hand and seal of the principal*; and then to write the name of the principal and deliver it as the act and deed of the principal. When executed by an attorney for several parties, it does not seem to be necessary to affix a separate seal for each person, if the seal affixed appears to have been intended to be adopted as the seal of each of the parties.³

§ 142. As a general rule, an agent cannot take a lease, for his own use, of property which he is employed to let; for it is a principle of law, that he who undertakes to act for another in any matter, shall not, in the same matter, act for himself.⁴ The rule here stated is similar to that which applies to the case of trustees or other agents, buying property which they are intrusted to sell; for they are not allowed to derive any benefit therefrom. Therefore the assignee of a bankrupt, who takes a lease of property himself, instead of selling it, is held answerable for any profit or loss upon the transaction.⁵ And, in all cases, it is incumbent on a person holding the character of an agent, to show that the transaction, from which he derives benefit, is perfectly fair and reasonable; and that a full consideration has been given by him, for a lease obtained from his principal.⁶

¹ *White v. Skinner*, 18 Johns. 307; *Norton v. Herron*, 1 C. & P. 648.

² *Townsend v. Corning*, 28 Wend. 485; *Frontin v. Small*, 2 Ld. Ray. 1418; *Stone v. Wood*, 7 Cow. 458.

³ *McDill v. McDill*, 1 Dall. 63; *Bohannons v. Lewis*, 3 T. B. Mon. 376; *Yarborough v. Monday*, 2 Dev. 498; *Stabler v. Cowman*, 7 Gill & J. 284; *Ball v. Dunsterville*, 4 T. R. 313.

⁴ Per Ld. Thurlow, in *Whichcote v. Lawrence*, 8 Ves. 740.

⁵ *Ex parte Hughes*, 6 Ves. 617; 8 Ves. 387.

⁶ *Kingsland v. Barnewall*, 4 Brown, P. C. 154.

SECTION XIII.

BY ALIENS.

§ 143. It is a general rule of law, that, although an alien cannot acquire title to property by mere operation of law, as by descent,¹ yet he may by purchase.² He may also make a grant, which will be effectual against all persons except the state; but, if he purchases an estate in fee for life, or for a term of years, the king, on office found, shall have it. Yet, until office found, he may enjoy it; for, until then, the alien is seised.³ Pursuant to these general principles, and under such restrictions, the common law permitted an alien friend to take a lease for a year of a house for the benefit of trade; yet, according to Lord Coke, none but an alien merchant could lease land at all, and then only as necessary to trade.⁴ The English statutes, also, made leases of dwelling-houses or shops, granted to a stranger, who was an artificer, void, if they extended to a term of years; only permitting leases at will, or from year to year.⁵ But this law, so contrary to sound policy and the spirit of commerce, has more recently been construed liberally, in favor of aliens;⁶ and Mr. Chancellor Kent well questions whether any such law exists with us at all, at least in respect to the subjects of those nations with whom we have commercial treaties.⁷

§ 144. The common-law doctrine also received an important modification by the Revised Statutes of New York.⁸ By it, a resident alien, who has filed, in the office of the Secretary of State, an affidavit that he is a resident of the State of New York, and intends to reside in and become a citizen of the United States, as soon as he can be naturalized, and that he has taken the incipient steps which the law requires to enable him to obtain natural-

¹ *Jackson v. Lunn*, 3 Johns. Cas. 109; *Hunt v. Warnicke*, Hardin, 61.

² *Burk v. Brown*, 2 Atk. 397; *Calvin's case*, 7 Co. 25.

³ Co. Lit. 2, b; 1 Prest. Con. 257; *Fairfax v. Hunter*, 7 Cranch, 603.

⁴ Co. Lit. 2, b; *Page's case*, 5 Co. 52, b.

⁵ *Pilkington v. Peach*, 2 Show. 185.

⁶ *Jevens v. Harridge*, Saund. 7.

⁷ 2 Kent, Com. 62. All contracts made between subjects or citizens of different

countries, which are at war with each other, are utterly void. If made in time of peace, the right to enforce them is suspended during the war, by reason of the personal disability of an alien enemy to sue or be sued. When peace is restored, this right revives, and the contract regains its original obligation, and may be enforced. *Griswold v. Waddington*. 15 Johns. 57; s. c. 16 *id.* 488.

⁸ 1 R. S. 720, §§ 15-20.

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ization, has, for six years after filing such affidavit, full power to hold and convey real estate, with the exception only that he cannot make leases of the same, or dispose of it by will. He is, therefore, capable of taking a lease, but cannot underlet the premises, though there seems to be no objection to his assigning or disposing of his whole interest in the lease.

§ 145. There are similar statutory provisions in favor of aliens in South Carolina, Indiana, Delaware, Arkansas, Rhode Island, Georgia, Tennessee, and Texas. And in Louisiana, Pennsylvania, New Jersey, Maryland, Michigan, Illinois, Massachusetts, Connecticut, Iowa, Wisconsin, and Ohio, the disability of aliens to take, hold, and transmit real property is entirely removed. While in Florida, Maine, and New Jersey, aliens may, by law, "take, hold, convey, or devise" real estate. In Missouri, Mississippi, California, and New Hampshire, disabilities are removed from all resident aliens, and in Kentucky, if resident for two years. While in North Carolina and Vermont there is a provision inserted in their constitutions, that every person of good character who comes into the State and settles there, taking an oath of allegiance to the same, may thereupon purchase, and by other just means, acquire, hold, and transfer land.¹ The disability never, of course, extended to a *denizen*, or foreigner who has been naturalized, who is as capable of being a lessor as a natural-born citizen.²

¹ 2 Kent, Com. 70.

² 1 Bl. Com. 374.

CHAPTER V.

THE INSTRUMENT OF DEMISE.

SECTION I.

THE FORMAL PARTS OF A LEASE.

§ 146. WE have seen that a demise for years, being but a chattel interest, may be perfected by the entry of the lessee, without deed or other instrument in writing; but a deed has always been required for the conveyance of an incorporeal hereditament, and will consequently be necessary for the creation of a lease for life. And when a demise, whether for life or years, is intended to embrace the various covenants usually entered into by the parties, it must be by deed. A deed is an instrument, under seal, written or printed upon paper or parchment. If written upon stone, board, linen, leather, or the like, it is no deed; for neither of these articles is so secure from alteration, and at the same time so durable, as paper or parchment.¹ If made between more parties than one, there should regularly be as many copies of it as there are parties; and each copy should be cut, or indented, at the top, so as to tally or correspond with each other. It then becomes what is technically called an indenture; the several copies of the same instrument being executed interchangeably by the respective parties. The copy delivered to the tenant is called the *original* lease; that retained by the landlord, the *counterpart*; but for all practical purposes, both parts are now considered originals, and must each be stamped.²

§ 147. If there is only a single instrument, it is not an indenture, but is called a deed-poll. The former possesses some advantages over the latter, since it imports obligations on the part of the lessee, amounting to an agreement between two persons; an

¹ Co. Lit. 229; F. N. B. 122.

² Dudley v. Sumner, 5 Mass. 488.

office which the deed-poll cannot perform, because it is but a declaration by the party executing it, of an act done, or, to be done by himself alone, in favor of the other party. The lessee's acceptance of an interest under such an instrument will be implied, unless he expressly dissents, and will render him liable to an action for rent; but he cannot be made liable to an action of covenant, for he makes none, since a covenant can only be created by a deed executed by the covenantor; and consequently by making use of a deed-poll, covenants on the part of a lessee are substantially dispensed with.¹

§ 148. The *date of a lease* is no part of its substance, and need not, in fact, be inserted; and, therefore, a mistake in the date will not vitiate the instrument.² If there is no date, or an impossible date, the term will be considered as commencing from the delivery of the deed; unless some particular time for its commencement is therein specified. But if the deed has a sensible date, the word *date*, in the body of it, will refer to that period, and not to the date of delivery.³ It is always competent, however, for either party to show, that the delivery took place on a day different from that of the date.⁴

§ 149. As to *the names of the parties*, it may be observed, that the law knows but one Christian name; and that, therefore, the omission or insertion of the middle name of either party is immaterial; for a party may show that he is as well known by one name as another.⁵ And neither a mistake in the spelling of the name, nor a variance in the name of a corporation, which are not materially different from the true name, will invalidate the instrument.⁶ If a lease is made by an agent or attorney, it should run in the name of the principal, and not of the agent; because a power of attorney gives no interest in the land, but merely authorizes the

¹ *Thompson v. Leach*, 2 Vent. 198; *Chancellor v. Poole*, 2 Doug. 764; *Burnett v. Lynch*, 5 B. & C. 589. The words of a covenant in a lease by indenture are to be taken, however set down in the instrument, as the words of the party to whom they properly belong, or, if properly belonging to both, as the words of both. The words of an indenture being the words of either party, are not to be taken most strongly against the one or beneficially for the other, as the words of a deed-poll are. *Beckwith v. Howard*, 6 R. I. 1.

² *Jackson v. Schoonmaker*, 2 Johns. 280, 284.

³ *Church v. Gilman*, 15 Wend. 656; *Styles v. Wardle*, 4 B. & C. 908.

⁴ *Steele v. Mart*, 4 B. & C. 272; *Morris v. Wadsworth*, 17 Wend. 108.

⁵ *Games v. Stiles*, 14 Pet. 322. Parol evidence is inadmissible to show that a lease executed in the name of and rendering rent to one person, was intended for the benefit of another. *Jackson v. Foster*, 12 Johns. 488; or, that although made on its face to A., it was for the benefit of A. and B. jointly. *Otis v. Sill*, 8 Barb. 102, 122.

⁶ *McCarthy v. Noble*, 5 N. Y. 380; *People v. Runkel*, 9 Johns. 147.

attorney to stand in the place, and act in the name, of his principal.¹ The person to whom the lease is made ought to be a party; for if A. covenants with B. that C. shall enter, and enjoy, this will be a mere collateral covenant and not a lease; because B., with whom it is made, is a stranger, and C., the intended lessee, is no party to the agreement.² But the omission of the lessee's name entirely from the instrument would render it invalid; for a deed without a grantee's name, and which has been left blank, to be inserted at some future time after its delivery, is void.³

§ 150. *Recitals* of former instruments, or of circumstances that have led to the making of the lease, are sometimes used by way of explanation. But an error therein is not material, unless it be in the recital of a lease, after the expiration of which the new term is intended to commence;⁴ or unless it shows that the lessor had no interest in the subject-matter of the demise.⁵ So a recital in a lease, that a former lease granted to another person had been surrendered, would not afford evidence of the fact of a surrender.⁶ Nor would the execution of the counterpart of a new lease, taken by the lessee prior to the determination of his former interest, and reciting that it was granted in consideration of the surrender of the former lease, produce a surrender, unless it were by operation of law; inasmuch as it did not purport of itself to be a surrender, having no words in it which could denote, or amount to, a yielding, or rendering-up of the interest of the lessee.⁷

§ 151. If a lease for years be granted subject to another lease,

¹ *Frontin v. Small*, 2 Ld. Ray. 1418; s. c. 2 Strange, 705; *Wilks v. Back*, 2 East, 142.

² *Porry v. Allen*, Cro. El. 173; 1 Leon, 186; *Havergil v. Hare*, 3 Bulst. 251.

³ *Jackson v. Titus*, 2 Johns. 430; U. S. v. *Nelson*, 2 Brock. 64; *Hayden v. Westcott*, 11 Conn. 129; *Ayres v. Harness*, 1 Ham. 368; *Edelin v. Sanders*, 8 Md. 118; *Ingram v. Little*, 14 Ga. 173; *Squire v. Whitton*, 1 Clarke & F. 888; but see *Wiley v. Moor*, 17 S. & R. 488. The law in England was settled as stated in the text in *Hibblewhite v. McMorine*, 6 M. & W. 200; *Davidson v. Cooper*, 11 M. & W. 794; and in New York, after an elaborate review of the authorities in *Chauncey v. Arnold*, 24 N. Y. 380. So *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 id. 387; *Simms v. Hervey*, 19 Iowa, 290; *Drury v. Foster*, 2 Wall. U. S. 24. The cases also deny that parol authority to fill up blanks before delivery is admissible,

though some expressions *contra* are found in *Chauncey v. Arnold*, and *Drury v. Foster*, *supra*; but these like the decision in *Inhabs. v. Huntress*, 53 Me. 90, relate to alterations not material, or instruments other than conveyances.

⁴ *Jackson v. Streeter*, 5 Cow. 529; *Bath and Montague's case*, 3 Ch. Cas. 101; *Shep. Touch.* 77. With regard to recitals, one reason for inserting them is to prevent the parties to the lease from afterwards denying the matters recited; for a lease by deed operates like any other deed as an estoppel, and prevents the parties to it from afterwards disputing facts recited in it. But see an important qualification of this rule in 1 *Greenleaf's Ev.* 287.

⁵ *Hermitage v. Tomkins*, 1 Ld. Ray. 729; *McAreavy v. Hannan*, 13 Ir. Com. L. 70.

⁶ *Lyon v. Reed*, 18 M. & W. 285.

⁷ *Roe v. Archbishop of York*, 6 East, 86.

to commence after the expiration of such lease, which is recited to have been made to a third person, when in truth there never was such a lease; or supposing one if made, to have expired, or to have been originally void, the new demise will take effect immediately on the execution of the deed.¹ So if a lease for years be granted, to commence after the termination of a former one, then existing, but misrecited in a material part, the new term will commence immediately, in enumeration of years; though not in possession until the end of the former lease. But if misrecited in an immaterial part, the term will commence at the end of the existing lease.² A misrecital of the lessee's name has been deemed material when calculated to mislead; but a misrecital of the rent, of the time or place of payment, of the covenants, or that the lease was without impeachment of waste, will not be deemed material misrecitals of the lease.³

§ 152. Rent, as such, is not, as we have observed, essential to a lease; for, from favor, or for a valuable consideration paid in gross, the tenant may have a lease without any render. But some consideration, express or implied, must appear to give validity to the lease as a contract; and this is either a good consideration, as natural affection; or valuable, as money, or the rent reserved.⁴ The reservation may be, not only in money, but in grain, animals, or produce; or it may consist of the personal services of the lessee.⁵ It is not, however, absolutely necessary that the amount of the reservation be fixed at the time of the creation of the tenancy, for this may be determined afterwards.⁶ And if no amount of rent has

¹ *Foot v. Berkley*, 1 Vent. 88; *Bishop of Bath's case*, 6 Co. 34, b; 36, a.

² *Miller v. Manwaring*, Cro. Car. 897.

³ *Foot v. Berkley*, *supra*, per Tirrel, J.

⁴ *Failing v. Schenck*, 3 Hill, 844; *State v. Page*, 1 Spears, 408. And see, *ante*, § 14.

⁵ Where the rent consists of a certain portion of the annual produce of the farm, it is commonly called letting the land on shares, or, sometimes, cropping it. A cropper is one who is employed to raise a single crop, and who is to be paid for his labor by a certain portion of the produce. He is held to be a servant, and not a tenant, nor tenant in common of the crop with the owner; and it is only when this contract assumes the shape of a lease, and the tenant goes into possession to the exclusion of the landlord, that the relation of landlord and tenant subsists between them.

⁶ *Denn v. Cartright*, 4 East, 29. Chancellor Kent, 3 Com. 462, is of opinion that the best way of reserving perpetual rents, and preserving uniformity in value, is to make them payable in wheat, or other produce. The ancient leases in New York, in the manor counties, are generally of this description. It saves the interest of the persons in whose favor rent is reserved from sinking by the depreciation of money, owing to the augmentation of gold and silver, and the accumulation of paper credit. And Adam Smith observes, that such rents have preserved their value much better than those which have been reserved in money. It certainly seems to be the fairest mode of letting, as well for the landlord as the tenant: the landlord has the advantage of a prosperous harvest, and the tenant escapes the heavy loss which a year of scarcity might bring upon him.

been agreed upon, the tenant will still be bound to pay as much as the premises are reasonably worth.¹

§ 153. If, however, the consideration is fraudulent, unjust, or immoral; if, for instance, it is founded on a marriage-brokers transaction, or be contemporaneous with a loan of money, and used as a means of evading the usury laws, the lease will be void; although, in the latter case, the proposal for connecting the loan with the lease may proceed from the lessor.² But an under-lessee, not concerned in the loan, or cognizant thereof, will not be disturbed by such a consideration.³ Nor will a lease be set aside, merely on the ground of its being contemporaneous with an advance of money to the lessor, unless there be, in addition, some evidence or legal presumption that the advance was made as a means of usury.⁴ As a general rule, however, a lease granted in consideration of a loan will not, on principles of public policy, be allowed to stand; and especially, if any advantage has been taken by the lessee of the distresses of the lessor, it will be considered a mere evasion of the statutes against usury.⁵ Still, the taint of usury may be only matter of inference; and, if it can be shown that no advantage has been taken by the lessee, but, on the contrary, that the circumstances are such as to render it unconscionable, on the part of the lessor, to seek to set aside the transaction, and that it would be a manifest hardship to the lessee to do so, a court of equity will not interfere. If it were otherwise, the doctrine of setting aside leases connected with a loan of money might be converted, by dishonest landlords, into an instrument of greater fraud than that which it was designed to prevent.⁶

§ 154. No particular or technical form of words is necessary to constitute a reservation of rent. A demise, *provided* the lessee pay such a rent, or in *consideration of the rent aforementioned*, will be as effectual as if it contained the words *yielding and paying*, which are the words generally made use of for this purpose.⁷ And,

¹ *Scrantom v. Booth*, 29 Barb. 171.

² *Brown v. O'Dea*, 1 Sch. & L. 115; *Drew v. Power*, *ib.* 182; *Molloy v. Irwin*, *ib.* 310; *Doe v. Gooch*, 3 B. & A. 664.

³ *Molloy v. Irwin*, *supra*. *Sed quære de hoc*, under the New-York Usury Law.

⁴ *Moore v. McKay*, Beat. 282; *Von Hollen v. Knowles*, 12 M. & W. 602.

⁵ *Morony v. O'Dea*, 1 Ball & B. 116; *Corbet v. Segrave*, 2 *id.* 101; *Brown v. O'Dea*, 1 Sch. & L. 119; *Drew v. Power*, *ib.* 190.

⁶ *O'Brien v. Grierson*, 2 Ball & B. 332; *Molloy v. Irwin*, *supra*. But the propositions in the text are of but limited application in this country. Usury avoids a contract only in Arkansas, New York, North and South Carolina. In all the other States some penalty is annexed other than avoidance.

⁷ *Drake v. Munday*, Cro. Car. 207; *Caswell v. Districh*, 15 Wend. 379.

as to the person in whose favor it is reserved, it is, perhaps, best that the reservation should be in general terms, without saying to whom; for, in that case, the law directs the intent, according to the nature of the lessor's interest.¹ As if a lessee for years makes an under-lease reserving rent to *him and his heirs*, during the term, it would, nevertheless, accrue to his executors; for it is but a chattel interest, and not the freehold, which alone passes to an heir.² Being an incident to the reversion, it must follow the nature of the land out of which it is reserved; as if a man seised as heir on the part of his mother, demise land rendering rent to him and his heirs, it must go to heirs on the part of the mother.³ And where a husband is possessed of a term of years, in right of his wife, and demises, rendering rent, the rent after his death goes to his executors, and not to the widow.⁴

§ 155. If a *special reservation* is made, care must be taken that it be to him from whom the estate in the land is derived;⁵ for, if a lessor reserves rent to himself and *his wife*, although this is good for his life, yet after his death, the wife, being a stranger, cannot have the rent;⁶ for the same reason, if it be reserved, not to the lessor but to *his heir*, it will be bad.⁷ But although rent, as such, cannot be reserved to a stranger, for the want of privity, such a reservation may be good as a sum in gross, for which an action in covenant will lie.⁸ And if a man seised of a freehold make a lease for a term of years, to commence after his death, rendering rent to his heirs, this reservation will be good.⁹

§ 156. A special reservation was anciently construed strictly according to the words employed, and if it ran to the lessor *or* his heirs, in the disjunctive, it terminated with the lessor's death; and if to the lessor, his executors, administrators, and assigns, during the term, he having a freehold, his heirs could not recover because not mentioned, nor his personal representatives, because the

¹ Jaques v. Gould, 4 Cush. 384.

² Knolles's case, Dyer, 5, b, 45, a; Co. Lit. 47, a.

³ Van Wicklen v. Paulson, 14 Barb. 654; Cother v. Merrick, Hard. 94. An annual rent may, however, be reserved by deed, upon a grant in fee, and will be valid as a rent-charge; notwithstanding there is no reversion in the person entitled to it. Van Rensselaer v. Hays, 19 N. Y. 68.

⁴ Co. Lit. 46, b; Loftus' case, Cro. El. 279.

⁵ Co. Lit. 47, a; Hornbeck v. Westbrook, 9 Johns. 73; Ege v. Ege, 5 Watts, 188. Rent can only be reserved in favor

of a person having a legal estate in the land.

Gilbertson v. Richards, 4 Hurlst. & N. 276.

⁶ 2 Rol. Abr. 447, l. 38.

⁷ 8 Rep. 70; Co. Lit. 99, b; 213, b.

⁸ Frontin v. Small, Stra. 705; s. c. 2 Ld. Ray. 1418. But one not privy to the consideration, nor party to the deed, cannot sue thereon. Mellen v. Whipple, 1 Gray, 317. In Brewer v. Dyer, 7 Cush. 387; one whom lessee had let in to possession on a written agreement to pay lessor rent, was held liable to lessor on privity of consideration, though no party to the contract.

⁹ Oates v. Frithe, 2 Rol. Ab. 447; Co. Lit. 99 p.; 2136.

rent was annexed to a freehold reversion.¹ But the former position was held otherwise where the covenant was to pay rent *during the term*; and the latter was soon overruled,² upon the well-established principle that rent, reserved to be paid during the term, follows the nature of the reversion, and goes to the person entitled to such reversion, though misdescribed, and the misdescription may be rejected as surplusage.³ Thus if the lessor was seised in fee his heirs could alone recover rent, though reserved to the lessor, his executors, administrators, and assigns, during the term; while, on the other hand, if the lessor had but a chattel interest his personal representatives could alone recover rent, though reserved or covenanted to be paid to him and his heirs.⁴ If, however, it does not clearly appear whether the lessor's interest is chattel or freehold, the words of the reservation or covenant will govern.⁵ In like manner, where a life-tenant with remainders over by a conveyance operative under the statute of uses had power to lease and reserve rent to himself and his heirs, it was held the remainder-man could recover thereon, because the reservation should follow the inheritance.⁶

§ 157. *Exceptions* are frequently introduced, to restrain, explain, or qualify general terms in a demise; as to except a farm out of a manor, a close out of a farm, or the like. But an exception of that which is expressly granted is void; as if a man demise a house and shops, excepting the shops; or certain lands and underwoods thereunto belonging, excepting the underwoods; or twenty acres, excepting ten acres; in each of these cases the exception is void.⁷ So an exception of a thing to which the grantor has no right is void; and therefore a lessee for years or life, not being lessee without impeachment of waste, cannot, on assigning over his term, except to himself the timber-trees, the gravel or clay, or

¹ Co. Lit. 214, b; *Richmond v. Butcher*, Cro. El. 217.

² *Mallory's case*, 5 Co. 112; s. c. Cro. El. 882; *Sury v. Brown, Latch*, 99; *Sacheverell v. Frogate*, 1 Vent. 161.

³ *Sacheverell v. Frogate*, 1 Vent. 161, a leading case. It was admitted in this case that if the reservation were to lessor merely, without more, the rent would cease on his death. *Wootton v. Edwin*, 12 Co. 36; 11 Edw. III. 86; but the contrary opinion is given by Littleton, and is apparently approved. *Sacheverell v. Frogate*, 2 Wms. Saund. 368, *in notis*. And it may be doubted, if in this case the rent would not at this day be held to follow the

reversion, and recoverable by whoever was entitled thereto.

⁴ *Whittome v. Lamb*, 12 M. & W. 818.

⁵ *Dollen v. Batt*, 4 C. B. n. s. 760; where the interest was held a chattel, because the reservation was to lessor, his administrators and assigns.

⁶ *Whitlock's case*, 8 Co. 69; *Isherwood v. Oldknow*, 8 Maule & S. 882; *Greenaway v. Hart*, 14 C. B. 340. But if the power is not followed, the reservation is void. *Yellowly v. Gower*, 11 Exch. 274.

⁷ *Stukeley v. Butler*, Hob. 170; 8 Dy. 264, b, n, (40); *Kenson v. Reading*, Cro. El. 244.

the benefit of the coal-mines within the land.¹ But a lessee without impeachment of waste may make such an exception. So if he grant a less estate than his own ; as, if lessee for years underlet for a shorter term, or lessee for life make a lease for years, in either case, the wood, underwood, and trees growing upon the land, may properly be excepted ; for the mesne lessor remaining tenant, and continuing liable to his lessor, may thus secure to himself a remedy against the sub-lessee, in the event of his cutting down trees, or the like.² If a lessor intends to retain a right of way, or indeed any other right or control, over the demised property, he must expressly reserve it. A covenant by the lessee, to pull down the corner of the house leased to him, for the purpose of letting the lessor make a cart-way over the spot, will not confer such a right.³ And a reservation of a right of way on foot, and for cattle and sheep, does not give a right of way to carry manure, which implies drawing it in a carriage.⁴

§ 158. A *reservation* is properly of some right or profit, to arise from the subject of the demise, which had previously no separate existence ; while an exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it. As, in the case of a demise of all that farm called A., except such a close, the close would pass as part of the farm without the exception ; and the words of exception are considered the words of the lessor.⁵ But where there is a reservation in favor of the lessor of a thing *dehors* the lease, as a way, common, or other profit ; or a proviso that it shall be lawful for the lessor, at any time during the term, to cut and carry away the trees, — the words amount to a reservation, or an agreement on the lessee's part for the lessor's enjoyment, and not to an exception.⁶ An exception includes every thing dependent on it, and necessary for its enjoyment ; thus, if a lease reserve the wood, &c., it includes the right to enter and carry it away.⁷ So, notwithstanding an exception in a lease of certain closes or rooms which the lessee is not to use, he may still pass and repass through them,

¹ Saunders's case, 5 Co. 12, a ; Sanders v. Norwood, Cro. El. 688.

² Bacon v. Gyrling, Cro. Jac. 296 ; Percy's case, 18 Co. 60 ; 1 Com. Dig. 607, Biens, H.

³ Good v. Hill, 2 Esp. 690.

⁴ Brunton v. Hall, 1 Gale & D. 207.

⁵ Bullen v. Denning, 5 B. & C. 842.

⁶ Russell & Gulwel, Cro. El. 657 ; Durham Co. v. Walker, 2 Gale & D. 326.

⁷ Foster v. Spooner, Cro. El. 17 ; Cardigan v. Armitage, 2 B. & C. 206. But by an exception of certain rooms by lessee a right of foot way, not of carriage way, is reserved. Fort v. Brown, 46 Barb. 866.

if they are so situated that he cannot otherwise have the complete enjoyment of the premises demised to him.¹ If there is a reasonable doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be construed favorably for the lessee and against the lessor. As in a lease of certain lands, excepting and reserving all timber-trees and other trees, but not the annual fruit thereof, it was held that the apple-trees were not within the exception.² And, if the exception is not specified with reasonable certainty, it is void altogether; as in the case of a demise of a manor excepting one acre, without specifying what acre.³ A saving-out of an exception defeats the exception to the extent of the saving; and, therefore, if one let a manor for years, excepting the mansion-house, saving to the lessee a certain chamber, the chamber passes as if there had been no exception.⁴

§ 159. As to *words of demise*, we may observe that no particular form of words is necessary to constitute a lease; but whatever expressions explain the intention of the parties to be, that one shall divest himself of the possession of his property, and the other take it for a certain space of time, are sufficient; and will amount to a lease for years, as effectually as if the most proper and pertinent form of words had been made use of for that purpose.⁵ The usual terms, however, by which a lease is made are, "demise, grant, and to farm let;" but, according to Sir Edward Coke, the word *dedi* is sufficient to make a lease for years.⁶ And a covenant with a man to stand seised to his use will operate as a lease at common law.⁷ So will a license to enter and enjoy land, or to reside in a certain house.⁸ And where a man, by his will, declared, "I have made a lease to J. S. for twenty-one years, he paying but twenty shillings rent," it was held a good lease for twenty-one years, and that the word *have* should be taken in the present tense, and equivalent in significance to the word *grant* in a deed of feoffment, by which the party is estopped from denying the creation of the estate.⁹ An

¹ Lifford's case, 11 Co. 52 a.

² Bullen v. Denning, *supra*; Shep. Touch, 100; Cardigan v. Armitage, *supra*.

³ Dorrell v. Collins, Cro. El. 6. A reservation in a lease of "one day's service, with carriage and horses" annually, on a day named, is not void for uncertainty. Van Rensselaer v. Jones, 5 Den. 449.

⁴ Leigh v. Shaw, Cro. El. 872; 3 Dyer, 264, b, n, (40).

⁵ Hallett v. Wylie, 3 Johns. 47; Thorn-

ton v. Payne, 5 *id.* 74; Bac. Abr. tit. Lease; Maverick v. Lewis, 3 McCord, 211.

⁶ Co. Lit. 801, b. The term *grant* includes a *demise* or *lease*. Darby v. Callaghan, 16 N. Y. 71, 75.

⁷ Right v. Thomas, Burr, 1446.

⁸ Right v. Proctor, Burr, 2209.

⁹ 2 Bend. 7. That a recital in a will is an estoppel to all claiming under the will, see Denn v. Cornell, 3 Johns. Cas. 174.

agreement that A. shall have, occupy, and enjoy land, will enure as a lease, if it appears to be the intention of the parties to create a present relation of landlord and tenant.¹ But if a forfeiture would be incurred by making a lease, and the intent of the parties does not clearly appear, the courts will construe it as an agreement for a lease, and not a lease.² And it has been held, that if the owner of premises sells and transfers them by written instrument, and there is also a separate agreement between himself and the vendee (founded on a sufficient consideration other than the sale of the premises) that a third person shall be tenant to the vendee from year to year, this agreement being collateral to the sale, and not a condition thereof, creates such a tenancy, though not inserted in the instrument.³

§ 160. An accurate *description* of the premises constituting the subject-matter of the demise is important, for the purpose of passing all the property intended to be comprised in the lease, as well as for giving effect to the instrument; since, if it does not ascertain the premises with reasonable certainty, it is void.⁴ It is not, however, generally advisable to particularize too minutely all the various circumstances of name, place, boundary, and occupation; such only as are sufficient for purposes of identity should be introduced; for, where numerous circumstances are referred to, they tend to confusion, and questions frequently arise how far they must concur in distinguishing the demised premises, and to what extent words of particular explanation may qualify words of general description. But as a general rule, applicable to this, as well as to other parts of the contract of lease, all inaccuracies and uncertainties may be explained by evidence outside of the written instruments, if such evidence neither varies nor contradicts the written contract.⁵

¹ *Hallett v. Wylie*, *supra*, 1 Rol. Abr. 847, l. 40; *Whitlock v. Horton*, Cro. Jac. 92; *Evans v. Thomas*, *ib.* 172; *Doe v. Ashburner*, 5 T. R. 163.

² *Lady Montague's case*, Cro. Jac. 801.

³ *Denn v. Cartright*, 4 East, 29. See *ante*, chap. 1, § 1.

⁴ *Dingman v. Kelly*, 7 Ind. 717. A description of the premises, though imperfect, is sufficiently certain if the boundaries can be ascertained with reasonable certainty, especially if possession has been taken, and they have been occupied under the lease. *Pierce v. Minturn*, 1 Cal. 470.

⁵ As general rules of construction, it may be observed that written documents

are themselves the best evidence of the facts they contain, the circumstances they relate, and the intentions they declare. Regard is to be had to all their parts; and general words may be restrained by particular recitals. If a lease operates two ways, the one consistent with the intention of the parties, and the other repugnant to it, effect will be given to the intent; for deeds are always to be construed so as to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they shall in another. *Quackenboss v. Lansing*, 6 Johns. 49. Although the intent of the parties be in opposition to the strict letter of the con-

§ 161. In general the grant of a thing passes the incident as well as the principal, though the latter only is mentioned; and this effect cannot be avoided without an express reservation.¹ Thus, a *messuage*, or mansion, includes not only the dwelling-house, but all the out-houses, barns, stables, cow-house, and dairy, if they be parcel of the mansion, although they be not under the same roof, or lie contiguous to it.² A garden is parcel of a house, and passes without the addition of the word *appurtenances*.³ By the grant of a piece of ground, a necessary right of way to it, over the grantor's land, also passes. So a grant of trees carries a power to enter on the land, and cut and carry them away.⁴ The word *land* passes all that grows or is built upon its surface; including all buildings, trees, fixtures, and fences.⁵ A *farm* includes houses and lands; while a *grange* will include not only barns, but stables and out-houses used for the purpose of husbandry.⁶ But the demise of a *house* or barn, without other words to extend its meaning, will pass no more land than is necessary for its complete enjoyment.⁷ In some cases the grant of the produce of the soil will pass the soil itself; thus *pasture* will be taken not only as the privilege of feeding on the land, but as the land itself. So the grant of a wood will pass the soil as well as the timber. And where the issues and profits of the land were demised for a term of years, the land itself was held to pass,

tract, it must prevail when clearly ascertained from it. *Hathaway v. Power*, 6 Hill, 463; *Tracy v. Albany Exch. Co.* 7 N. Y. 474; *Marvin v. Stone*, 2 Cow. 781; *Browning v. Wright*, 2 B. & P. 13; *Solly v. Forbes*, 4 Moore, 448; *Goodtitle v. Bailey*, Cowp. 600. A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it. *Barlow v. Scott*, 24 N. Y. 40. Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it. *White v. Eagan*, 1 Bay, 247; *Wight v. Dickson*, 1 Dow. 141. A sweeping clause, at the end of a particular specification, will not pass any property of a different nature from that particularly set forth. *Smith v. Strong*, 14 Pick. 128; *Barnard v. Martin*, 5 N. H. 536. An instrument of demise, agreed to let for a year, but most of the subsequent stipulations were inapplicable to a tenancy determinable by a notice to quit; it appeared on its face to have origi-

nally contained words creating a tenancy from year to year, which had been struck out; such words were allowed to explain the intention of the parties to have been to lease for a year only; and that the terms inapplicable to such a tenancy must be expunged, or as only applicable in case the tenancy should continue. *Strickland v. Maxwell*, 4 Tyrw. 346; *Hull v. Fuller*, 7 Vt. 100.

¹ *Pattison v. Hull*, 9 Cow. 747; *Rood v. N. Y. & E. R. R. Co.*, 18 Barb. 80.

² 1 Hale, 568; *Kerslake v. White*, 2 Stark. 508.

³ *Bettisworth's case*, 2 Co. 82; *Plow. 171*; 1 Inst. 5, b.

⁴ *Per Best, C. J., Holmes v. Goring*, 2 Bing. 83; *Clarke v. Cogge*, Cro. Jac. 170.

⁵ *Canfield v. Foord*, 28 Barb. 386; *Green v. Armstrong*, 1 Den. 550; *Mott v. Palmer*, 1 N. Y. 564. The word "land," when used alone in Dutch deeds, means arable land only. *Van Gorden v. Jackson*, 5 Johns. 440. A conveyance of the fee of the land does not pass growing trees previously sold. *Warren v. Leland*, 2 Barb. 618.

⁶ Co. Lit. 4, a; *Burton v. Brown*, Cro. Jac. 648; *Isham v. Morgan*, 9 Conn. 874.

⁷ *Bennet v. Bittle*, 4 Rawle, 389.

for to have the issues and profits, was said to be the same thing as to have the land itself.¹

§ 162. This principle, however, is to be understood as applying to such things only as are directly incident to the grant, and necessary to the enjoyment of the thing granted; therefore an easement not naturally and necessarily belonging to the premises will not pass.² And if a man, upon a lease for years, reserve a way through the house of a lessee to a backhouse, he can only use it at reasonable times, and upon request.³ A way of necessity is also limited by the necessity which created it; when the necessity ceases, the right of way also ceases. If, therefore, at any subsequent period, the party entitled to such way can, by passing over his own land, approach the place to which it led by as direct a course as he would have done by using the old way, the way ceases to exist as of necessity.⁴

§ 163. Whether certain premises are parcel of and included under those demised is always matter of evidence. If the grant be in its terms certain, no evidence can be permitted to vary it; but it frequently happens that the parcels demised are so loosely described, that unless such evidence is admitted, great inconvenience might result. Where the parcels described, however, can be generally identified, it is sufficient, though all the particulars may not be true: thus in a demise of certain meadows *containing ten acres*, which are afterwards found to contain *twenty acres*, all the meadows pass.⁵ But where a demise is by indenture, the parties are estopped from disputing that the state of the premises was the same as described in the lease; as, for instance, that land described as meadow was such.⁶ So natural, visible, or artificial boundaries will prevail over specified courses and distances; since these are less certain than the former.⁷ As in a demise of a cer-

¹ *Parker v. Plummer*, Cro. El. 190; Co. Lit. 4, 6.

² *Manning v. Smith*, 6 Conn. 289.

³ *Per Parke, B.*; *Sand v. Kingscote*, 6 M. & W. 189.

⁴ *Holmes v. Goring*, 2 Bing. 76; *Wilson v. Bagshaw*, 5 Mann & R. 448; *Osborn v. Wise*, 7 C. & P. 761.

⁵ *Doe v. Burt*, 1 T. R. 701; *Doe v. Jersey*, 3 B. & C. 870; *Cary v. Thompson*, 1 Dale, 85.

⁶ *Birch v. Stephenson*, 3 Taunt. 469.

⁷ *Doe v. Thompson*, 5 Cow. 371; *Jackson v. Widger*, 7 id. 723; *Jackson v. Ives*, id. 661; *Massengill v. Boyle*, 4 Humphrey, 205; *Smith v. McAllister*, 14 Barb. 484. A grant

of land bounded on tide-water, extends only to ordinary high-water mark. *Wiswall v. Hall*, 3 Paige, 313. If bounded by a river where the tide does not ebb and flow, the grant extends to the middle of the stream. *Comr's v. Kempshall*, 26 Wend. 404; 4 Hill, 369. If it is described as running along the shore or the bank of the river, the grant is restricted to the margin at high water. *Storer v. Freeman*, 6 Mass. 435; *Hatch v. Dwight*, 17 id. 298; *Kingman v. Sparrow*, 12 Barb. 201; if, however, it be to the bank of a stream which is not navigable, the grant will extend to the thread of the stream. *Jackson v. Louw*, 12 Johns. 252; but see *Halsey v. McCormick*, 13 N. Y. 296.

tain tract of land on a creek, supposed to contain twenty acres more or less, then in the possession of a certain person ; it was held that the lease was not limited to the twenty acres, but extended up to the creek of which the party was in possession.¹ But if the land is described in the instrument by certain known monuments, such a description must prevail ; even to the exclusion of an understanding between the parties that the lands shall be bounded by certain other monuments.² Where the quantity is mentioned, in addition to a description of the boundaries of land, without any express covenant that the land contains that quantity, the whole must be considered as mere description.³ If the description refers to another deed, it may be made sufficiently certain by the reference.⁴

§ 164. If the description of the premises in a deed is imperfect, yet sufficient appears to point inquiry to the true locality and boundary of the land, the deed is not void for uncertainty, but the defect may be cured by parol evidence, to give identity to the premises intended to be conveyed.⁵ And, where there are particulars, sufficiently ascertained to designate the thing intended to be demised, the addition of circumstances false or mistaken will not frustrate the deed ; as, if the words "with the dwelling-house thereon," be inserted in the description, when, in fact, there is no dwelling-house on the premises, it will be considered merely a false circumstance, which does not control the rest of the description, or defeat the conveyance.⁶ An indorsement upon a lease, written at the time of its signing and delivery, is deemed to be in-

¹ *Hall v. Powel*, 4 S. & R. 456 ; *Shaw v. Clements*, 1 Call, 438 ; *Bustin v. Christie*, Tayl. 116 ; *Baker v. Seekright*, 1 Hen. & M. 177. The words *more or less* must be confined to a reasonable quantity. In one case it was held that they could not include so large an amount as thirty acres. *Day v. Flynn*, Owen, 133.

² *Clark v. Baird*, 9 N. Y. 183.

³ *Powell v. Clark*, 5 Mass. 355. Where a person lets to others his *farm and farming house thereon*, there is no restriction as to the right of possessing other houses on the farm ; for the lease of the *farm* embraces all buildings upon the land, whether specified or not. *Hay v. Cumberland*, 25 Barb. 594. If land is conveyed by metes and bounds, and the description at its close contains an assertion of the quantity, such assertion is matter of description only, and not a covenant of quantity. *Roat v. Puff*, 3 Barb.

353 ; *Mann v. Pearson*, 2 Johns. 37 ; *Howe v. Bass*, 2 Mass. 380 ; *Powell v. Clark*, *supra* ; *Jackson v. M'Connell*, 19 Wend. 175 ; *Belden v. Seymour*, 8 Conn. 19 ; *Smith v. Dodge*, 2 N. H. 303 ; *Call v. Barker*, 3 Fairf. 320 ; *Large v. Penn*, 6 S. & R. 488.

⁴ *Allen v. Bates*, 6 Pick. 460. Punctuation will be resorted to, in order to settle the meaning of an instrument, after all other means fail. *Ewing v. Burnet*, 11 Pet. 41.

⁵ *Jenkins v. Bodley*, 1 Smedes & M. Ch. 338 ; *Seaman v. Hogeboom*, 21 Barb. 398.

⁶ *Jackson v. Clark*, 7 Johns. 217 ; *Jackson v. Marsh*, 6 Cow. 281. A lease of a lot describing it as number 2, but adding metes and bounds, descriptive of lot number 4, which the lessor did not own, the tenant taking possession of the former, is a good lease of number 2. *Lush v. Druse*, 4 Wend. 318.

corporated in it, and may, therefore, introduce any matter tending to qualify the provisions contained in the body of the instrument, or even to defeat it by way of condition.¹ Even separate instruments, executed at the same time, relating to the same subject-matter, may be construed, and taken together, as different parts of the same agreement.² But a written declaration indorsed on the lease, after execution by the lessor, that he intended to demise a greater interest than the lease expresses, is inoperative to convey any interest.³ Nor will any other indorsement made upon an instrument under seal, after its execution, in any manner control or affect the original deed, unless such indorsement be under seal also; for a deed is incapable of discharge, but by an instrument of as high a nature as itself.⁴

§ 165. As a general rule, the *unauthorized alteration* of an instrument, by one claiming a benefit under it, avoids it so far as respects any remedy by action on it; and this, whether the alteration be material, or of a part quite immaterial.⁵ Though it is otherwise if the alteration is made by a stranger, without the consent of the party.⁶ The rule, however, has not the same application, where the title to real estate is in question; for neither the alteration nor the destruction of a deed, will divest property which has once become vested by a transfer of possession; although the covenants contained in such a deed may be thereby rendered void. Yet, where an estate cannot have existence but by deed, and the deed creating such estate is fraudulently destroyed by the party possessing the estate, the deed is void as to any remedy in favor of the fraudulent party; and the estate which he derived under it is also gone. But as to an estate which may exist without deed, such as a term of years, a rent, or other incorporeal hereditament, a fraudulent

¹ *Flint v. Brandon*, 4 B. & P. 78; *Lyburn v. Warrington*, 1 Stark. 162; *Emerson v. Murray*, 4 N. H. 171.

² *Hills v. Millar*, 8 Paige, 254.

³ *Russell v. Scott*, 9 Cow. 279; *Goodright v. Mark*, 4 Maule & S. 80; *Williams v. Handley*, 3 Bibb, 10.

⁴ *Goodright v. Mark*, *supra*. A lease was extended by an agreement indorsed upon it, varying its terms; and, subsequently, after the expiration of the original term, another extension of "the within lease" was indorsed: held that it extended the modified lease. *Cram v. Dresser*, 2 Sandf. 120.

⁵ *Pigot's case*, 11 Co. 266; *Master v. Miller*, 4 T. R. 820; *Woodworth v. Bank*

of America, 19 Johns. 391; and see *ante*, § 149. Blanks in a sealed instrument cannot be filled in after its delivery, by another person, except by the authority of the grantor himself under seal. Co. Lit. 171; *Shep. Touch.* 54; 4 Vin. Abr. Blank.; Com. Dig. Fait A., p. 1. There are, however, cases where, in the same written instrument, there are entirely disconnected obligations, or statements, wholly independent of each other; where the alteration or insertion of one, after the others have been executed, will not affect it. Such was the case of *Doe v. Bingham*, 4 B. & A. 672; *Woolley v. Constant*, 4 Johns. 54.

⁶ *Rees v. Overbaugh*, 6 Cow. 746.

alteration or cancellation destroys the deed, with the covenants contained in it, but not the estate; yet, as a rent-charge can only be created by deed, a fraudulent alteration of such a deed destroys both the deed and the estate. Where, however, a rent was created by indenture, with a counterpart, each of the parts being executed by both parties, and one was delivered to and possessed by each, and the grantee of the rent altered his deed in a material part, it was held, that though a deed is essential to a rent as lying in grant, neither the remedy nor the estate of the grantee was gone, for although the alteration of the grantee's deed avoided that, yet both deeds being originals, there was a good deed in the hands of the grantor to support both the contract and the estate.¹

SECTION II

THE EXECUTION OF A LEASE.

§ 166. The execution of a lease consists in its signature and delivery, if it be a parol contract; or in its sealing and delivery, if it be by deed. When a seal is required, it must, in New York,² New Jersey,³ and the New England States,⁴ be, according to the common-law form, which is strictly an impression upon wax, or wafer, or other tenacious substance capable of being impressed;⁵ but, in practice, the seal of an individual is frequently a plain piece of paper, without any device, attached to the deed with wafer; while the seal of a corporation exhibits some device to give it a distinctive character. A mere stamp on the paper upon which the instrument is written, whether made by an individual or by a corporation, without the use of wax or wafer, is insufficient;⁶ nor will an ordinary piece of wax, without an impression upon it,

¹ *Lewis v. Payn*, 8 Cow. 71; *Bolton v. Carlisle*, 2 H. Bl. 259; and see *Davidson v. Cooper*, 13 M. & W. 343. Title passes by the delivery of a lease, and will not be revested in the lessor by an alteration of the lease by the lessee. *Smith v. McGowan*, 3 Barb. 404. Held otherwise in *Bliss v. McIntyre*, 18 Vt. 466.

² *Warren v. Lynch*, 5 Johns. 239. In New York the seal of a corporation may be made by impression directly on the paper. *Laws* 1848, p. 305.

³ *Perrine v. Cheeseman*, 6 Halst. 174.

⁴ 4 Kent, Com. 445.

⁵ *Beardsley v. Knight*, 4 Vt. 471. According to Lord Coke, a seal is wax with an impression. *Inst.* 169.

⁶ *Bank of Rochester v. Gray*, 2 Hill, 227; *Farmer's Bank v. Haight*, 3 *id.* 493. Except in New York, where the seal of a corporation or of a public officer may be stamped on the paper, without wax or wafer. *Laws* of 1848, p. 305. In the case of *Ross v. Bedell*, 5 Duer, 462, the learned judge expresses the opinion that an actual seal, stamped upon paper of sufficient tenacity to receive and retain the impression, is a seal in the technical sense, and within the strict definition of the common law; the

suffice; for mere wax, without a character, is no seal.¹ In Pennsylvania, Indiana, Ohio, Wisconsin, Delaware, Florida, Michigan, Minnesota, Oregon, Missouri, Texas, Illinois, Mississippi, Georgia, and North Carolina, a mere flourish with a pen, at the end of the name, a circle of ink, or a scroll, is allowed in place of a seal, when it appears to have been intended as such.² In Virginia and Alabama, it must appear in the body of the deed that there was an intention to substitute the scroll for a seal.³ In Maryland a scroll has always been considered a seal, and it need not appear that the party intended to adopt it.⁴ While in South Carolina, it is good, unless the intention to seal in a more formal manner can be presumed from the face of the instrument.⁵ Kentucky has substituted a scroll, for a wax or wafer impression, by statute.⁶ In all the latter decisions, much force is given to the attestation clause. If by this it appears that the instrument was designed to be a sealed instrument, and there is any thing affixed to it or is connected with it which, by law, may be regarded as a seal, it will, *prima facie*, be taken to be a deed; and proof of the party's signature by the subscribing witnesses, if there be such, or by any other legitimate mode, will be presumptive evidence that he sealed it.⁷ As to the number of seals required to a deed, there appears to be no necessity for a multiplicity of them; nor that, when executed by several persons, each person shall have a separate seal; for several persons may bind themselves by one seal, if it appears that the seal affixed was intended to be adopted as the seal of each of the parties.⁸

§ 167. A deed takes effect, so as to vest the estate or interest to be conveyed, only from *its delivery* to the party himself, or to a

case, however, seems to refer to the sealing of a commercial obligation, and not to that of an instrument for passing an estate in land. To the same effect is *Curtis v. Leavitt*, 15 N. Y. 89. *Pillow v. Roberts*, 18 How. U. S. 472. So in Massachusetts, a corporation may seal by an impression made on paper without wax. Gen. Stat. c. 3, § 7; *Hendee v. Pinkerton*, 14 Allen, 381, 388. *Seemle*, such sealing is good at common law, and not for corporations only. But a mere printed seal not impressed on the paper is not a good corporate seal. *Bates v. Boston & N. Y. R. R.*, 10 Allen, 251; though otherwise in Maine. *Woodman v. York & C. R. R.*, 50 Me. 549.

¹ *Perry v. Price*, 1 Mo. 553; 2 Bl. Com. 297; *Warren v. Lynch*, 5 Johns. 239.

² *Alexander v. Jameson*, 5 Binn. 233;

Bradfield v. McCormick, 3 Blackf. 161; *Jones v. Logwood*, 1 Wash. 42.

³ *Austin v. Whitlock*, 1 Munf. 487; *Lee v. Adkins*, 1 Minor, 187.

⁴ *Trasher v. Everhart*, 3 Gill & J. 234; *Stabler v. Cowman*, 7 id. 284.

⁵ *Rolph v. Gist*, 4 McCord, 267.

⁶ *Bohannons v. Lewis*, 3 T. B. Monr. 376.

⁷ *Supra*, and see *Ball v. Taylor*, 1 C. & P. 417.

⁸ *Mackay v. Bloodgood*, 9 Johns. 235; *McDill v. McDill*, 1 Dal. 63; *Yarborough v. Monday*, 2 Dev. 493; *Ball v. Dunster-ville*, 4 T. R. 813; *Stabler v. Cowman*, *supra*; *Townsend v. Hubbard*, 4 Hill, 351; *Univ. of Vt. v. Joslyn*, 21 Vt. 52. This last case determines that the intention may be drawn from the lease itself in the absence of any other evidence.

third person, authorized to receive it.¹ If it requires the approbation of a third person to render it valid, it becomes operative from the time the approval is given, although it may have been executed before.² Almost any manifestation of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery. If the date be false or impossible, the delivery ascertains the time when the instrument is to take effect; but it will be intended to have been delivered on the day it bears date, unless the contrary is proved;³ notwithstanding it was not acknowledged until afterwards.⁴ There can be no delivery, however, without an acceptance, either express or implied:⁵ but the assent of the grantee to its acceptance may be presumed from the beneficial nature of the transaction;⁶ or where the deed was drawn and executed at his request.⁷

§ 168. It is not essential to a valid delivery, that the lessee be present, and that it be made to, or accepted by, him personally, at the time; for his acceptance may be presumed from many other circumstances, besides those above mentioned.⁸ Thus, the registry of a deed, at the request of the grantor, for the use of the grantee, and the grantee's subsequent assent thereto, will be equivalent to an actual delivery of the same.⁹ But the placing of the deed on record is only *prima facie* evidence of its delivery; and not even that, if there does not appear to be some assent on the part of the grantee;¹⁰ but a subsequent possession of the deed by the grantee,

¹ Jackson v. Hill, 5 Wend. 582; Shep. Touch. 57; 4 Cruise, § 52. The delivery of a deed is complete when the grantor has put it beyond his power to revoke or reclaim it. Brown v. Austen, 35 Barb. 341; Maynard v. Maynard, 10 Mass. 456; Doe v. Knight, 5 B. & C. 671. A return or redelivery of the deed to the grantor does not revest the title. Jackson v. Anderson, 4 Wend. 474; Jackson v. Page, 4 Wend. 585; Roe v. York, 6 East, 86; Jackson v. Chase, 2 Johns. 84; Jackson v. Wood, 12 id. 73; Jackson v. Wendall, *ib.* 355; and, if it has been once delivered, so as to take effect, a redelivery is of no effect, and cannot limit its operation; Verplanck v. Sterry, 12 Johns. 536; Kellogg v. Rand, 11 Paige, 59. A subsequent pledge of the deed with the grantor merely gives him an equitable lien. Jackson v. Parkhurst, 4 Wend. 209.

² Co. Lit. 36; Church v. Gilman, 15 Wend. 656; 1 R. S. 738.

³ Vesey, 206; 2 Bl. Com. 307; Goodrich v. Walker, 1 Johns. Cas. 250. Since the Revised Statutes of New York, the

presumption that a deed was delivered on the day it bears date does not prevail in respect to deeds not acknowledged or proved, and which have no subscribing witness. And such presumption never obtains where the deed is proved to have been in the hands of the grantor, at a period subsequent to its date. Elsey v. Metcalf, 1 Den. 323.

⁴ McConnell v. Brown, Litt. Sel. Ca. 459.

⁵ Jackson v. Richards, 6 Cow. 617; Jackson v. Phipps, 12 Johns. 421; Shep. Touch. 57.

⁶ Jackson v. Bodle, 20 Johns. 187; Belden v. Carter, 4 Day, 66; Wheelright v. Wheelright, 2 Mass. 447; Maynard v. Maynard, 10 Mass. 456.

⁷ Church v. Gilman, 15 Wend. 656.

⁸ Hatch v. Hatch, 9 Mass. 307; Belden v. Carter, *supra*; Scrugham v. Wood, 15 Wend. 545.

⁹ Hedge v. Drew, 12 Pick. 141; Elsey v. Metcalf, 1 Den. 323.

¹⁰ Chess v. Chess, 1 Penn. 82; Gilbert v. N. A. F. I. Co. 28 Wend. 43.

would be evidence of delivery to him.¹ Putting a deed in the post-office, directed to the grantee, has been held to be sufficient evidence of a delivery;² but merely sending it to a third person, or depositing it in the clerk's office, is not, unless it is also shown to have been done for the grantee's use.³ And where a registered deed, purporting to have been delivered, is lost, the presumption is, that it was delivered: but this presumption is rebutted, if the original deed is produced by the grantor, or if neither the grantee, nor any person on his behalf, was present at the attestation.⁴ The non-delivery of a deed may be shown by parol evidence;⁵ and the grantee is an admissible witness for that purpose.⁶ But its delivery cannot be proved by showing the declarations of the grantor's intention to deliver prior to its delivery, and of the subsequent possession of the land by the tenant, with the assent of the grantor.⁷ And it is further to be observed, that there can be no valid delivery of a deed after the grantor's death; nor of one which has been executed in blank, to be filled up afterwards by the person to whom it was delivered.⁸

§ 169. A lease may also be delivered as an *escrow*, which means a conditional delivery to a stranger, to be kept by him until certain conditions are performed, and then to be delivered over to the grantee. Until the condition is performed and the deed delivered, the estate does not pass, but remains in the grantor;⁹ but when the condition has been performed, and the deed is finally delivered, it will take effect from the time of its first delivery;¹⁰ notwithstanding either of the parties may have died before the condition has been performed.¹¹ And if it be duly delivered in the first instance, it will operate, although the grantee afterwards suffer it to remain in the custody of the grantor.¹² But there cannot be a delivery to the grantee himself as an *escrow*, to take effect upon the performance of a condition not expressed in the deed; and if so

¹ Maynard v. Maynard, 10 Mass. 456; Rathbun v. Rathbun, 6 Barb. 98.

² McKinney v. Rhoads, 5 Watts, 343.

³ Elsey v. Metcalf, *supra*.

⁴ Powers v. Russell, 18 Pick. 69.

⁵ Roberts v. Jackson, 1 Wend. 478.

⁶ Jackson v. Richards, 6 Cow. 617.

⁷ Hale v. Hills, 8 Conn. 39.

⁸ See *ante*, § 149, note 1; Jackson v. Leek, 12 Wend. 105.

⁹ Green v. Putnam, 1 Barb. 500; Jackson v. Richards, 6 Cow. 619.

¹⁰ Ruggles v. Lawson, 18 Johns. 285; Jackson v. Catlin, 2 Johns. 248; Bushell v. Pasmore, 6 Mod. 217; 3 Prest. Abstr. 104.

¹¹ Hunter v. Hunter, 17 Barb. 25, 82; Shep. Touch. 59.

¹² Souverbye v. Arden, 1 Johns. Ch. 240; Doe v. Knight, 5 B. & C. 671. Where the deed of A. and the note of B. were deposited by them with C. to be delivered in exchange when both parties should direct, it was held to be a delivery in *escrow*. It is not necessary that the term *escrow* should be used when a delivery is made to a third person, in order to prevent its being absolute: the intent of the parties will prevail. Clark v. Gifford, 10 Wend. 810.

delivered, it becomes at once absolute in law.¹ It will not, however, take effect as an operative interest, although left in the hands of the grantee, if it was only left for the purpose of being sent to a third person to remain in *escrow*.² Neither can it be delivered to a third person to be kept during the pleasure of the parties, and subject to their further order: such a delivery is not an *escrow*, but a mere deposit.³ And a deed, actually delivered by an agent, to one for whom it is made, is no longer an *escrow*, though placed in the hands of such agent, under an agreement that it should be considered an *escrow*.⁴ But a deed, delivered as an *escrow*, will not take effect until the condition is performed, except where the operation of the conveyance would be absolutely defeated, unless the first delivery should be permitted to have effect.⁵

§ 170. The execution of a lease by parol is complete without a witness; but, when the lease is by deed, two witnesses are required for its valid execution, in New Hampshire, Vermont, Rhode Island, Connecticut, Ohio, Georgia, Illinois, Kentucky, and Indiana. In Delaware, Tennessee, Mississippi, Maryland, and South Carolina, two witnesses are necessary where the deed is to be proved by witnesses. But by the common law which prevails in Pennsylvania, Massachusetts, Kentucky, and as well as in New York, no attesting witness is necessary to the validity of a deed.⁶ In New York, proof of its execution, made by one witness, or its acknowledgment before the proper officer without any witness, is sufficient to entitle it to be recorded.⁷ But the execution of a written lease, whether sealed or not, is not complete without a proper revenue stamp affixed thereto, and, if such stamp is not so affixed at the time of its execution with intent to defraud, the lease will be deemed invalid, and of no effect.⁸ Where several parties join in

¹ Arnold v. Patrick, 6 Paige, 810. Worrall v. Munn, 5 N. Y. 229; Lawton v. Sager, 11 Barb. 349. A deed delivered to the grantee is not held as an *escrow*; such delivery either takes effect absolutely, or it is void and works nothing. Braman v. Bingham, 26 N. Y. 488.

² Gilbert v. N. A. Ins. Co., *supra*.

³ James v. Vanderheyden, 1 Paige, 885.

⁴ Simonton's Estate, 4 Watts, 180.

⁵ Jackson v. Rowland, 6 Wend. 668.

⁶ 4 Kent, Com. 449; Wicks v. Caulk, 5 Har. & J. 86; Long v. Ramsay, 1 S. & R. 72; Sicard v. Davis, 6 Pet. 124.

⁷ 1 N. Y. R. S. 788, § 187. "Every grant of a freehold estate shall be sub-

scribed and sealed by the person from whom the estate is intended to pass, &c.; and, if not duly acknowledged previous to its delivery, its execution and delivery shall be attested by at least one witness, or, if not so attested, it shall not take effect as against a subsequent purchaser or incumbrancer, until so acknowledged." That a deed without any witness or acknowledgment is good as against the grantor. See 2 Bl. Com. 296; Champlain & St. L. R. R. v. Valentine, 19 Barb. 484.

⁸ Holyoke Machine Co. v. Franklin Paper Co., 97 Mass. 150; Vorebeck v. Roe, 50 Barb. 802; Blunt v. Bates, 40 Ala. 470, 475. But this provision has been held operative and applicable only in the United States

one agreement, only one stamp is necessary.¹ And if a material alteration is made in a lease, after it has become an available document, or, in an agreement for a lease, which has been already stamped, it must be restamped.²

§ 171. The statute laws of every State in the Union require that all conveyances of land, except certain chattel interests, in order to secure the priority to which they may be entitled, shall be *recorded*, after being first acknowledged or proved,³ in the county in which the premises are situated; and, if not so recorded, are void as against any subsequent incumbrancer or purchaser of the same premises, in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded.⁴ But actual notice is equivalent to record.⁵ There is nothing, however, in any of these statutes to invalidate a lease as between the parties themselves, which has not been recorded. They were intended to protect *bonâ fide* purchasers of property against secret or fraudulent conveyances, but give this protection only to such as record their conveyances, and thus warn others from taking a subsequent conveyance of property which has already been conveyed to them.⁶

courts. *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Morse*, *id.* 458. A lease, agreement, memorandum, or contract, for the hire, use, or rent of any land, tenement, or portion thereof, where the rent or rental value is three hundred dollars per annum or less, pays *fifty cents*; where the rental value exceeds the sum of three hundred dollars per annum, for each additional two hundred dollars, or fractional part thereof in excess of three hundred dollars, *fifty cents*. *An Act to provide Internal Revenue*, &c., passed June 30th, 1864, sec. 151, sched. B. & sec. 158. Under the English Stamp Act, an unstamped lease is not on that account invalid; but it cannot be read in evidence, if required to be produced in court. *Buxton v. Cornish*, 12 M. & W. 426.

¹ *Davis v. Williams*, 18 East, 282.

² *Reed v. Deere*, 7 B. & C. 261. Ground-rent deeds should be stamped at the same rates as conveyances of realty sold, fifty cents for each five hundred dollars, or fractional part of five hundred dollars of the consideration or value. It has been held that an agreement for a lease which contained an express provision for giving up a farm at Michaelmas, and to which the lessor with the consent of the lessee added the words "house and buildings," did not require a new stamp, such alteration being merely an expression of what was before implied. *Doe v. Houghton*, 1 Mann. & R. 208.

³ 4 Kent Com. 456.

⁴ Thus in New York, all conveyances of land including leases of three years and upwards, must be recorded. 1 R. S. 762, § 38. In Massachusetts, leases of seven years and upwards, Gen. Stat. c. 89, §§ 1 & 8; and similar provisions exist in most States.

⁵ *Tuttle v. Jackson*, 6 Wend. 213; *State of Conn. v. Bradish*, 14 Mass. 296; *Porter v. Cole*, 4 Greenl. 20; *Tart v. Crawford*, 1 McCord, 265; *West v. Randall*, 2 Mason, 206; *Colby v. Kenniston*, 4 N. H. 262; *Jackson v. Winslow*, 9 Cow. 18; *Jackson v. Phillips*, *ib.* 94; *Jackson v. Post*, *ib.* 120. That a judgment creditor is not a purchaser within the purview of the statute, see *Den v. Richman*, 1 Green, 55. In New York, the term "purchaser" is construed to embrace every person to whom any interest in real estate is conveyed for a valuable consideration, including every assignee of a lease or mortgage. 2 R. S. 762, § 87.

⁶ *Jackson v. Post*, *supra*; *Jackson v. West*, 10 Johns. 466. In some of the States, a period is allowed within which deeds must be recorded; and, according to Chancellor Kent, 4 Com. 457, a year is allowed in Delaware, Tennessee, Georgia, and Indiana; eight months in Virginia; six months in Pennsylvania, Maryland, North and South Carolina, Alabama, Illinois, and Ohio; three months in Missouri and Mississippi; and fifteen days in New Jersey.

CHAPTER VI.

OF RIGHTS AND LIABILITIES GENERALLY INCIDENT TO A TENANCY.

§ 172. BEFORE proceeding to examine the particular rights and liabilities of the respective parties to a demise, it may be found neither impertinent nor unprofitable to consider some of those obligations of a general character, which are necessarily incident to the relation of landlord and tenant, but which do not usually fall within the scope of those covenants, which the parties generally employ for the purpose of defining their respective rights and duties. Upon the making of a lease, rights and liabilities attach to each of the parties, not only in respect to each other, but also as regards other persons who are strangers to the contract. The landlord retains certain rights over the property, although he has parted with his possession; while the tenant assumes obligations as soon as he is clothed with that character. By virtue of his occupation, a tenant may become liable to support and repair bridges, highways, division-fences, and party-walls; to make good any damage that may be occasioned by his neglect to keep the premises in a safe condition, or to use them in a reasonable and prudent manner. His possessory interest will enable him to defend himself against all trespassers upon his premises, as well as against a disturbance, nuisance, or other offensive erection so near his dwelling as to render it useless or unfit for habitation. If there are ways, commons, fisheries, or other privileges or easements attached to the estate, they must be used in such a reasonable manner as not to infringe upon the rights of others who are equally entitled to the enjoyment of them with himself. And supposing him to have a right to remove buildings, or to mine and dig the soil, he is not to do so without considering what effect such operations will produce upon the adjoining house or land. We propose cursorily to examine each of these rights and duties in their order.

SECTION I.

ON THE PART OF THE LANDLORD.

§ 173. After the making of a contract of lease, the right of possession, in legal contemplation, remains in the lessor until the time when the contract is to be consummated by the entry of the lessee. After that period, the right of possession is changed, and the tenant is in a position to enforce this right by an action of ejectment;¹ and, after entry, to bring actions for injuries to his possession. The landlord's rights, after such entry, are confined to the protection of his reversionary interest merely; that is, to the maintenance of actions for such injuries as would, in the ordinary course of things, continue to affect the reversionary interest after the determination of the lease, whether the injury be committed by the tenant or by a stranger, and whether the term has expired or not.² Of such, are actions for breaking the windows of a house; or for stopping up a rivulet, whereby the timber on the estate becomes rotten, and the like.³ The injury complained of by the landlord, however, must be of such a character as to permanently affect the inheritance.⁴ A mere disturbance, if not of a continuous nature, even though done in the assertion of a right, will not entitle the reversioner to an action.⁵ But, if any one interferes with his tenants so far as to disturb their enjoyment, and thereby causes a loss of rent or other damage,⁶ the landlord may have an action; and, if the disturbance is continued, he may, from time to time, bring a fresh action.⁷ If a stranger enters upon the premises and cuts down trees, the landlord, immediately upon the severance, acquires such a right of possession as will

¹ See *ante*, § 15, and notes.

² *Starr v. Jackson*, 11 Mass. 519; *French v. Fuller*, 23 Pick. 104; *Jackson v. Peaked*, 1 Maule & S. 284; *Jesser v. Gifford*, 4 Burr. 2141; *Alston v. Scales*, 9 Bing. 8; *Baxter v. Taylor*, 4 B. & Ad. 72; *Bower v. Hill*, 1 Bing. N. C. 555; *Little v. Pallister*, 8 Greenl. 6; *Queen's Coll. &c. v. Hallett*, 14 East, 489; *Ray v. Ayers*, 5 Duer. 494; *Austin v. Hudson Riv. R. R.* 25 N. Y. 884.

³ *Bedingford v. Onslow*, Lev. 8, 209; *Ray v. Ayers*, *supra*; *Anderson v. Dickie*, 26 How. Pr. R. 106.

⁴ *Queen's Coll. &c. v. Hallett*, *supra*.

⁵ *Baxter v. Taylor*, 4 B. & Ad. 72. A reversion is an estate which remains in the grantor and his heirs, and which is to take effect in possession upon the determination by its own limitation of an outstanding particular estate. A right to enter and resume the possession for a breach of a condition is not a reversion. *Phenix v. Com'rs of Emigration*, 12 How. Pr. R. 1, 1 N. Y. R. S. 723, § 12. So see *ante*, § 16, and n.

⁶ *Aldridge v. Stuyvesant*, 1 Hall, 214.

⁷ *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

enable him to recover them in an action of trover.¹ But he may not bring an action of *trespass* for an injury to the land while there is a tenant for years lawfully in possession; for the ground of such an action is injury to the immediate possession, and the plaintiff must have been in either the actual or constructive possession when the trespass was committed.²

§ 174. The landlord generally retains the right to go upon the premises peaceably, for the purpose of examining what waste or injury if any has been committed by the tenant or other person, first giving notice of his intention to do so; but strictly he would have no such right unless he reserves it in the lease, for every unauthorized entry upon land, whether an injury be thereby inflicted or not, amounts to a trespass.³ He may, however, use all *ways* appurtenant to the premises for the purpose of demanding rent, making such repairs as are necessary to prevent the waste of the premises, or for removing an obstruction.⁴ But where the rent is payable in hay or other produce, to be delivered from the farm to the landlord, he is not entitled to go upon the land and take the hay, until it is delivered to him by the tenant, or has been severed, and set apart for his use.⁵

§ 175. The landlord's liabilities, in respect of possession, are, in general, suspended as soon as the tenant commences his occupation; if, therefore, a stranger be injured by the ruinous state of the premises, or if the fences are suffered to fall into decay, whereby a stranger's cattle stray, and are injured or lost, the landlord

¹ *Bewick v. Whitfield*, 3 P. Wms. 267; *Berry v. Heard*, Cro. Car. 242; *Schermerhorn v. Buell*, 4 Den. 422.

² *Campbell v. Arnold*, 1 Johns. 511; *Tobey v. Webster*, 3 *id.* 468; *Catlin v. Hayden*, 1 Vt. 375. So not where a tenant from year to year or a tenant at will, is in possession. *French v. Fuller*, 23 Pick. 104, though otherwise if the tenancy is strictly at will or at sufferance. The technical action of trespass is here intended, in contradistinction to the actions of trespass on the case before referred to. See, *post*, § 764.

³ *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Dixon v. Clow*, 24 Wend. 188; *Parker v. Griswold*, 17 Conn. 288. The New-York Court of Common Pleas has also held, that a landlord has no right to enter upon his tenant's premises during the term without the lessee's consent, although the tenant may have quit the possession of them, no right of entry having been reserved in the lease. *Shannon v. Burr*, 1 Hilt. 89. A landlord's

entry upon the possession of his tenant whose lease depends upon conditions which have not been violated is a trespass. *McGee v. Gibson*, 2 Ky. 353.

⁴ *Proud v. Hollis*, 1 B. & C. 8; *Penley v. Watts*, 7 M. & W. 601; *Shaw v. Cumiskey*, 7 Pick. 76. In England, it has been held that an immediate lessee may recover, as special damages, from an under-lessee who holds under similar covenants, the costs of defending an action, as well as the damages under it, brought by the original lessor for want of repairs; because, during the term of the under-lessee, he could not have entered for the purpose of repairing without making himself a trespasser. *Neale v. Wyllie*, 3 B. & C. 588; *Barker v. Barker*, 3 C. & P. 557; *Doe v. Bird*, 6 *id.* 195. But this doctrine has been overruled in *Penley v. Watts*, 7 M. & W. 601, and *Walker v. Hatton*, 10 *id.* 249; and such costs cannot be recovered unless a covenant to that effect exists.

⁵ *Dockham v. Parker*, 9 Greenl. 187; and see, *ante*, § 24, and notes.

is, in neither case, answerable.¹ But it is otherwise if he has undertaken to keep the premises in repair, and the injury was occasioned by his neglect to make the necessary repairs,² or by the negligence of the workmen whom he had employed to make such repairs;³ or if the dangerous and ruinous condition of the premises when demised has since the demise by mere natural causes without any act on the part of the tenant produced injury to a neighboring owner.⁴ Nor is he answerable to third persons for a nuisance erected on the premises by a tenant; unless he knew, or had reason to believe, when he let the premises, that they would be used in such a way as would amount to a nuisance.⁵ But, if he renews the lease, or grants another lease, with the nuisance upon it, he becomes liable to an action after such renewal; for he thereby affirms the nuisance, and it may be deemed to have been continued by himself.⁶ Every continuance of a nuisance is, in judgment of law, a fresh nuisance;⁷ and, in case it be continued by the alienee of the party who erected it, the remedy lies against both of them, and not against the alienee alone for continuing the nuisance.⁸

¹ *Cheetham v. Hampson*, 4 T. R. 318; *Mayor, &c., v. Corlies*, 2 Sandf. 301.

² *Payne v. Rogers*, 2 H. Bl. 350. The owner of a pier who lets it with a defect in its construction or condition from which, while it is in the tenant's possession, injuries are caused to a third person, is liable to the latter therefor, though the lease contained a covenant by the lessee to make all necessary repairs. *Moody v. Mayor, &c.*, 43 Barb. 282.

³ *Leslie v. Pounds*, 4 Taunt. 649.

⁴ *Todd v. Flight*, 9 C. B. n. s. 377; *Gandy v. Jubber*, 5 Best & S. 78.

⁵ *Fish v. Dodge*, 4 Den. 311. If the owner so constructs and adapts a building, that, in its ordinary use, it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, he is liable for the nuisance thus caused by his tenants. But if it proved a nuisance by reason of a special unusual circumstance, that is, by water in the cellar, the defendant is not liable for the nuisance, unless he knew, or had reason to believe, when he let the building, that the use of it in the ordinary mode would prove a nuisance. *Pickard v. Collins*, 23 Barb. 444.

⁶ *Waggoner v. Jermaine*, 3 Den. 306. *The King v. Pedly*, 1 Ad. & E. 827. This case seems to have gone further than the statement in the text, and seems to indicate that if the owner of land erect a building, of which the occupation is likely to prove a nuisance, or of a nature to require particular care to prevent the occupation from becoming a nuisance, and leases, and the nuisance afterwards occurs from want of care, or otherwise, on the part of the tenant, the landlord is responsible. This case is severely criticised by Cresswell, J., in *Rich v. Basterfield*, 4 C. B. 788; but is sustained by the American cases. Thus in *Carson v. Godley*, 26 Pa. St. 111, where the owner of real estate erected buildings to be used as government warehouses, knowing they would have to sustain heavy weights he was held liable to a person injured by the fall of the buildings, while under lease, caused by storage of great weight, and their defective construction. See also *Godley v. Hagerty*, 20 Pa. St. 387; *House v. Metcalf*, 27 Conn. 631.

⁷ *Vedder v. Vedder*, 1 Den. 257.

⁸ *Brown v. Woodworth*, 5 Barb. 550.

SECTION II.

ON THE PART OF THE TENANT.

§ 176. We have seen that the rights, as well as the liabilities, of a tenant for life attach upon the execution and delivery of the lease; but, in the case of a lease for years, they commence upon the making of the contract. Before the tenant enters into possession, he acquires an interest in the term, whether the lease is to commence at once or on a future day.¹ This interest is assignable, and, in case of the death of the lessee before taking possession, will pass to his executors or administrators. If, however, a person entitled to an estate for years, once enters, and is put out of possession, he cannot afterwards assign his term to a stranger; for, by his entry, the estate for years became actually vested, and being after that defeated by the entry of a stranger, the lessee has only a right of entry left in him, which the policy of the law will not suffer him to transfer, because it is a mere right of action.² The tenant's right of possession becomes complete on the day fixed by the agreement for the commencement of the term; and, when that day arrives, he is entitled to the possession of the premises in the same condition they were in on the day of the demise. If possession is withheld, he may maintain an action of ejectment against either the landlord, or a stranger who wrongfully withholds the possession; or if the possession is withheld by the lessor or one under his authority, he may, at his option, bring an action for damages against the landlord for a breach of his agreement.³ His term of years is also liable to be sold under an execution against

¹ *Whitney v. Allaire*, 1 N. Y. 805.

² *Bruerton v. Rainsford*, Cro. El. 15; *Saffyn's case*, 5 Co. 124, a; 2 Roll. Abr. 850. In Delaware, an incoming tenant is held to be entitled, from custom and necessity, to enter before his term commences, for the purpose of filling the ice-house on the premises. *State v. McClay*, 1 Harringt. 520.

³ *Trull v. Granger*, 9 N. Y. 115. The English cases go further, and hold lessor liable to the lessee if possession is withheld by a stranger, considering the lessor bound to deliver "possession, and not merely the chance of a lawsuit." *Coe v. Clay*, 5 Bing. 440; *Jenks v. Edwards*, 11 Exch.

775. But the American cases do not hold lessor to this liability. *Gardner v. Keteltas*, 8 Hill, 880; *Pendergast v. Young*, 1 Fost. 284; *Cozens v. Stevenson*, 5 S. & R. 424; and post § 312. If, before the day, named for taking possession, the lessor wrongfully removes a fixture so as to render the dwelling unfit for habitation, the lessee may refuse to take possession. *Cleves v. Willoughby*, 7 Hill, 88. And whether a destruction of the premises by fire, between the making of the lease and the commencement of the term, does not discharge the tenant from the obligation of his covenant to pay rent, see *Wood v. Hubbell*, 10 N. Y. 488.

him, like any other chattel; although the judgment is not a lien upon it, either at common law or by statute.¹ He may also underlet, unless he is restrained by the terms of his lease from doing so.² He becomes responsible for all his covenants in the lease from the time the term commences, although he refuses to take possession of the property.³ And if another person enters into the possession of the demised premises, by the tenant's consent, he will be considered, in respect of the landlord's rights, as substituted in the tenant's place, although he may disclaim all privity with the tenant.⁴

§ 177. If the landlord refuses to give the lessee possession, pursuant to the agreement, he renders himself liable, not only to an action of ejectment, but also for any damages which the lessee may have sustained by the wrongful withholding of possession; and the measure of damages in such a case is said to be the difference between the rent reserved in the lease, and the yearly value of the premises to the lessee.⁵ If he cannot put the lessee into possession of all the land he contracted to give him, the latter is under no obligation to accept part, and will be justified in abandoning the premises.⁶ And though the lease is delivered after signing to the party interested, with a stipulation that such delivery shall be subject to the landlord's being satisfied with the reference given him by the tenant, it is a proper question for a jury, in an action for the non-performance of the agreement, whether, inquiry, having been made, the answer given by the party referred to was such as reasonably satisfied the condition, the landlord having declared it was not satisfactory to him, and having on that ground refused to let the tenant into possession. And in such an action, the plaintiff may give evidence of any particular loss sustained by the breach

¹ *Ex parte Wilson*, 7 Hill, 150; and see *People v. Westervelt*, 17 Wend. 674; s. c. 20 *id.* 416. See *ante*, § 14, note.

² *Jackson v. Harrison*, 17 Johns. 66.

³ *Bellasis v. Burbriche*, 1 Ld. Ray. 170; s. c. Holt, 199; and see *Eaton v. Jaques*, Doug. 461. Under a joint lease to two tenants, the occupation of one is sufficient to make both liable for the rent. *Kendall v. Carland*, 5 Cush. 74.

⁴ *Howard v. Ellis*, 4 Sandf. 869.

⁵ *Trull v. Granger*, *supra*. It is not essential to a valid lease, that the building which is the subject of the contract should be erected at the time the lease is made, or that the lessor be the owner of the ground upon which the building is to

be placed. *Haven v. Wakefield*, 39 Ill. 509.

⁶ *Hay v. Cumberland*, 25 Barb. 594. If he prefers to occupy, but does not obtain possession of all he hired, he is liable, on a *quantum meruit*, for the part occupied. *Hurlbut v. Post*, 1 Bosw. 28; *Lawrence v. French*, 25 Wend. 448. Under a lease for years, the destruction of the building by fire, before the commencement of the term, absolves the lessee, and entitles him to have the lease cancelled; for, until the term commences, the contract is purely executory, and possession is a condition precedent to any liability for rent. *Wood v. Hubbell*, 5 Barb. 601; s. c. 10 N. Y. 479.

of the agreement, if he has made a sufficient averment of loss in his declaration.¹

§ 178. After taking possession, the tenant is at once invested with all the rights incident to possession, and is entitled to the use of all the privileges and easements appurtenant to the tenement, and to take such reasonable estovers and emblements as are attached to the estate, unless restrained by special agreement. He may maintain an action against any person who disturbs his possession, or trespasses upon the premises, though it be the landlord himself, who has, in general, no right to enter and repair, unless there be a stipulation to that effect, or the repairs are necessary to prevent waste.² If a stranger enters and commits waste, the tenant will still be liable to an action for that waste by his landlord, and will be left to his remedy over against the stranger.³ And, even after his term has expired, he may still recover damages for an injury sustained during its continuance.⁴ As occupant, he is, *primâ facie*, liable to answer for any neglect in the repair of highways, fences, or party-walls; it being generally sufficient, except where the statutes have otherwise provided, to charge a man for such repairs by the name of occupant.⁵ He is also liable for all

¹ Ward v. Smith, 11 Price, 19; Coe v. Clay, 5 Bing. 440.

² Leader v. Moxon, 8 Wils. 461; s. c. 2 W. Bl. 924; Bedingfield v. Onslow, 8 Lev. 209; Shadwell v. Hutchinson, 2 B. & Ad. 97; Barker v. Barker, 3 C. & P. 557. Landlord and tenants may each maintain an action for injury to his particular estate. Austin v. Hudson Riv. R. R., 25 N. Y. 834. Where a person is in the peaceable possession of premises, with the acquiescence of the owner for a month, and has taken such possession from one who claims to have had a parol lease from the owner, and was in possession for two months, he is to be deemed rightfully in possession until his tenancy is properly terminated, by notice or otherwise. The owner may not forcibly eject him, nor will he be justified in closing up the entrance to the premises, or in refusing to allow the tenant to remove his goods. And in an action for damages in such a case, the owner will be held liable for the value of the goods detained, as well as for the injury done by breaking up the business of the tenant. Marquart v. LaFarge, 5 Duer, 559; Dickinson v. Goodspeed, 8 Cush. 119.

³ Cook v. The Champlain Tr. Co. 1 Den. 91. The situation of a tenant is

analogous to that of a common carrier to prevent collusion (and not on the presumption of actual collusion); both are charged with the protection of the property intrusted to them, against all but the acts of God and the King's enemies. Per Chambre, J., in Attersol v. Stevens, 1 Taunt. 198. And, in Louisiana, if he abandons the premises before the expiration of the lease, he is at once bound for the rent of the whole term, and may be sued. Christy v. Casanave, 2 Martin, N. S. 451.

⁴ 2 Roll. Abr. 551; Symonds v. Seabourne, Cro. Car. 825; Bedingfield v. Onslow, *supra*; Holt, N. P. C. 548.

⁵ Regina v. Bucknall, 2 Ld. Ray. 792; Rider v. Smith, 3 T. R. 766; Cheetham v. Hampson, 4 *id.* 818. The occupant, and not the owner of land, is bound to repair drains and sewers; hence, in a suit by an adjoining owner for non-repair thereof, the declaration must allege occupation by the defendant. Russel v. Shenton, 8 Q. B. 449. A lessor is not liable for the wrongful acts of a lessee or his servants during the continuance of the lease, for over such acts the lessor has no control. Blake v. Ferris, 5 N. Y. 48; Heimstreet v. Howland, 5 Den. 68; Felton v. Deall, 22 Vt. 170; Norton v. Wiswall, 26 Barb. 618. And where a town

injuries produced by a nuisance kept upon the premises, or by an obstruction of the highway adjacent to them.¹ Also, for not properly covering an old shaft of a mine, whereby the plaintiff's horse fell down and was killed;² for not properly covering a coal-hole, or cellar entrance, sewer, or railing of an area opening into the highway, or the like;³ and that the premises were in the same condition before the defendant came into possession of them is no defence.⁴ For the rule is general, that, where a man is in possession of fixed property, he must take care that the property is so managed that other persons are not injured; and that whether the property is managed by his own immediate servants, or contractors with them, or their servants.⁵

§ 179. He must also be careful to preserve the boundaries of the land demised to him; for if he permit them to be lost or destroyed, so that the lessor's premises cannot be distinguished from his own, he must either restore the land specifically, or give him other land of equal value. And this obligation extends to cases where there are several lessees.⁶ He is bound to the performance of all such duties as the ordinances of any city or town may, from time to time, impose upon him, by virtue of his residence within the bounds of such

was compelled to pay damages for a defective sidewalk, attached to premises in the possession of a tenant, the tenant was held liable to reimburse the town for such payment. *Lowell v. Spaulding*, 4 Cush. 277.

¹ *Marriott v. Stanley*, 1 Scott, N. R. 392; s. c. 1 M. & G. 568. If a house on the highway be ruinous and likely to fall down, it is a nuisance, and the occupant, although he be but a tenant at will, is bound to repair it, for as the danger is the matter that concerns the public, the public is to look to the occupant and not to the estate. *Regina v. Watts*, 1 Salk. 357.

² *Sybray v. White*, 1 M. & W. 485.

³ *Payne v. Rogers*, 2 H. Bl. 349; *Leslie v. Pounds*, 4 Taunt. 649; *Laugher v. Pointer*, 5 B. & C. 559.

⁴ *Coupland v. Hardingham*, 3 Camp. 398.

⁵ Per Little Dale, J., *Laugher v. Pointer*, 5 B. & C. 547, 562; repeated by Parke, B., *Quarman v. Burnett*, 6 M. & W. 499, 510. This distinction holding the owner of fixed property liable, where the owner of movable property would not be, for injuries caused by contractors or their servants, is doubted by Lord Denman in *Milligan v. Wedge*, 12 Ad. & E. 737, 740; though again repeated by Parke, B., *Rap-*

son v. Cubitt, 9 M. & W. 710. It was first stated to distinguish *Laugher v. Pointer*, *supra*, where the injury was caused by careless driving, from *Bush v. Steinman* 1 B. & P. 404, where the owner of a house had been held liable for injuries caused by the negligence of his contractor's servant. The distinction was not laid down, but it was suggested only that "the rule of law may be, &c.," and was a dictum merely, and *Bush v. Steinman* has been since overruled, *Reedie v. Lond. & N. W. R. R.*, 4 Exch. 244, 254; *Overton v. Freeman*, 11 C. B. 867. No English decision holds the owner of fixed property liable in such a case if not in direct control over the work, and the law is the same in this country. *Hilliard v. Richardson*, 8 Gray, 349; *Blake v. Ferris*, 5 N. Y. 48. In *Althorf v. Wolfe*, 22 N. Y. 355, where the owner of a house was held liable for the negligence of one whom his servant had procured without the master's knowledge to help him do some work directed by the master, Denio, J., admitted the law otherwise in case of a contractor, p. 365. And see *post*, § 192 n.

⁶ *Attorney-General v. Fullerton*, 2 Ves. & B. 263; *Willis v. Parkinson*, 1 Swanst. 9.

incorporation.¹ He must, at the same time, respect the rights of his co-tenant, and will render himself liable to an action for obstructing or disturbing him in the use of the premises.² As co-tenant, he has no right to make improvements on the property and charge his co-tenant with a proportion of the expense, without the consent of such co-tenant, express or implied; although he may make such repairs as are necessary to preserve the property, at the expense of all the joint-owners, without asking their consent.³

§ 180. The tenant must also regard the interest of his landlord, in respect to his right of possession, and give due notice of any attempt made to dispossess him. The Revised Statutes of New York, in order to secure the landlord against collusion between his tenant and third persons, and thereby prevent change of possession to the prejudice of the landlord, oblige every tenant to whom a declaration in ejectment, or any other process, proceeding, or

¹ *Rex v. St. Luke's Hosp.* 2 Burr. 1053; *Milward v. Caffin*, 2 W. Bl. 1880.

² *Per Wilde, J., in Keay v. Goodwin*, 16 Mass. 3. In a case arising in the city of New York, the first story, with the basement and under cellar, of a four-story store, was leased to the plaintiffs, and the three upper stories to the defendant, at the same time, each with the appurtenances. The entrance to the upper stories was in front, over a short entry leading to a staircase. This entry was separated, from the residue of the first floor by three folding-doors, with bolts to fasten on either side. There was a hatchway in the floor of the same entry, leading to the basement and cellar, over which hatch a tackle and fall were placed, to raise and lower goods, the wheel of which was in the attic, and was worked by ropes passing down through the respective floors. The keeping of the folding-doors open in business hours was a great advantage to the occupant of the first floor. The opening of the hatch in that floor obstructed the passage to the upper stories, unless persons passed through the folding-doors. In a contest as to the rights of the respective parties, the Superior Court of the city of New York held, that the tenant of the first and under stories had the right to use the hatchway in the entry, and the tackle and fall for depositing the goods in the basement and cellar, and elevating them therefrom, making use of them in good faith, and not keeping the hatch open unnecessarily; that the tenant of the first floor had the right to keep the folding-doors open during business hours in the daytime, free

from the control of the tenants of the lofts, and that each had the right to close and fasten them at night; and that the tenant of the lofts might pass in and out through the folding-doors, when the hatchway was in use by the tenant of the first floor. *Browning v. Dalesme*, 8 Sandf. 18, per Oakley, J.

³ *Taylor v. Baldwin*, 10 Barb. 626; *Story Eq. Jur.* § 1235; *Loring v. Bacon*, 4 Mass. 675; *Converse v. Ferre*, 11 *id.* 325; *Doane v. Badger*, 12 *id.* 65; *Mumford v. Brown*, 6 Cow. 475; *Coffin v. Heath*, 6 Metc. 80; *ante*, §§ 114-117. One tenant in common cannot maintain an action against his co-tenant in trespass for an entry upon the land. *Van Orman v. Phelps*, 9 Barb. 500; nor for the destruction of the property by negligence, *Moody v. Buck*, 1 Sandf. 304; nor to recover documents relating to the joint estate, although an action of waste, or an injunction to stay waste, will lie as between joint tenants or tenants in common, *Hawley v. Clowes*, 2 Johns. Ch. 122; s. c. 12 Johns. 484; 2 N. Y. R. S. 884, § 3; *Smallman v. Onion*, 8 Bro. Ch. 621; *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 *id.* 128. Persons who occupy the same building, and have each the privilege of using the water-pipes, can only be held responsible for damages resulting from their negligent use or care, on proof of negligence on their own part; and neither is responsible for the negligence of the others; though they may be jointly liable if their obligations under the lease are joint. *Moore v. Goedel*, 7 Bosw. 591.

notice of any proceeding, to recover the land occupied by him, or the possession thereof, shall be delivered, forthwith to give notice thereof to his landlord, under the penalty of forfeiting three years' rent of the premises so occupied by him; which may be sued for and recovered by the landlord, or person of whom such tenant holds.¹ And the attornment of a tenant to a stranger is absolutely void; and will not in anywise affect the possession of his landlord, unless it be made, — 1. With the consent of the landlord; 2. Pursuant to or in consequence of a judgment at law, or the order of a court of equity; or, 3. To a mortgagee after the mortgage has become forfeited.² If, however, a tenant should acquiesce in the wrongful act of a stranger, it will not bind the landlord when he regains possession; as, if he suffers windows, newly opened by his neighbor, to remain unobstructed for more than twenty years, and so become ancient lights, the landlord, at the expiration of the term, will not be bound thereby, but may shut up the lights, or treat them as if they had been duly opened.³

§ 181. At common law, any person, in case of actual necessity, and to prevent the spreading of a fire, might prostrate a building in a block or street without being responsible in trespass or otherwise; and the sufferer had no legal redress for any injury he might have sustained, against the individual who did the act.⁴ But the

¹ 1 R. S. 748, § 27. Under this statute it has been held by the Court of Appeals in New York, that a landlord, or other person, who is entitled by statute to be substituted in the place of, or joined with, the defendant in an action of ejectment, who, without causing himself to be made a party, defends such suit unsuccessfully, in the name of the original defendant, will be ordered to pay the costs of the plaintiff, on motion, after execution against the defendant on the record has been returned unsatisfied. *The Farmers' L. & T. Co. v. Kursch*, 5 N. Y. 558. This statute does not apply to a notice of an intention to apply for a sale of the property under a surrogate's decree for payment of debts. *Rigney v. Coles*, 6 Bosw. 479.

² *Ib.* 744, § 3. "Wherever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding such tenant may have ac-

quired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the periods herein limited." 2 R. S. 294, § 18.

³ *Jesser v. Gifford*, 4 Burr. 2141; *Daniel v. North*, 11 East, 872.

⁴ *Respublica v. Sparhawk*, 1 Dall. 357; 2 Kent, Com. 838; *White v. City Council*, 2 Hill, S. C. 571. In the saltpetre case, 12 Co. 13, it was resolved by all the Judges; "that for the commonwealth, a man shall suffer damage; as for saving a city or a town, his house shall be plucked down, if the next be on fire; and a thing for the commonwealth every man may do without being liable to an action." And the same principle was afterwards adjudged in *Mouse's case*, *ib.* 63, which was an action of trespass against the defendant, who was a passenger in a barge, for throwing out the goods of the plaintiff in a storm; where the court held, that in case of necessity, and to save the lives of the passengers, it was lawful for the defendant to cast the goods out of the barge. See also *Dyer*, 86; *Bac. Abr.*, &c.

injured party, in all cases where his property was taken and destroyed for the public good, was entitled to compensation from the public.¹ The Constitution of the United States affirms the common-law principle, and provides that private property shall in no case be taken for public uses, without just compensation being made.² Not only are the rights of the owner of the building protected, but the principle extends to the protection of the tenant's interest also; who is entitled to recover damages from the public treasury, not only for his interest in the building, but also for the merchandise or other personal property belonging to him, which was in, and destroyed with, the building. This was decided in a case arising out of the great fire which occurred in the city of New York, in December, 1835; where the court recognized the principle, that, in case of necessity, and to prevent the spread of a fire, the ravages of a pestilence, or any other great public calamity, the private property of an individual may be taken and destroyed for the good of the many, without subjecting those whose duty it is to protect the public interests to any personal liability for the damage which the owner thereby sustains; but that, in all such cases, as well as in the event of a building being destroyed by a mob, the public, or the corporation of the city within whose bounds such destruction happens, are liable to make good all damages which either landlord or tenant may suffer thereby.³ It was admitted, however, in the same case, that no damages are recoverable if the building, or the property therein, would have been inevitably destroyed by the flames, if it had not been pulled down, or if it was on fire, and beyond the hope of extinguishment, when the order of the magistrate was given.⁴

§ 182. As third persons are liable to both landlord and tenant for injuries committed by themselves, so, on the other hand, both landlord and tenant may respectively become liable to such third

¹ Per Buller, J., in *Governor, &c. v. Meredith*, 4 T. R. 797.

² Const. U. S. art. 5 of Amend. This provision of the constitution is understood to apply to cases where property is taken by the United States authorities for public uses. But the legislatures of all the States have also provided some mode of compensation for an injured individual, where his property has been taken or destroyed for the public good.

³ *The Mayor v. Lord*, 17 Wend. 285; s. c. 18 *id.* 126; *Same v. Pentz*, 24 *id.* 668. But owners of goods who have no

estate or interest in the building destroyed, have no claim to damages for their destruction. *Stone v. The Mayor*, 25 Wend. 157; *Russell v. The Mayor*, 2 Den. 464. The fact that the owner is insured does not affect his right to compensation, nor entitle the corporation to a deduction for the amount recoverable or received upon the policy; for the insurers would be entitled to subrogation, or to a reduction for the amount received by the owner from the city. *The Mayor v. Pentz*, *supra*.

⁴ See also *Pentz v. Ætna Fire Ins. Co.* 9 Paige, 668.

persons; for where a landlord has made himself liable to repair the premises, and a stranger is injured by his neglect, he will be liable to a special action on the case.¹ But, where it is the business of the county or parish to repair, neither landlord nor tenant will be liable under those circumstances.² If a stranger, whose goods have been, or are about to be, distrained upon the tenant's premises, in order to redeem them, is obliged to pay the rent, he may recover it again from the tenant, as for money paid to his use.³ And the same rule applies where the goods of a lodger, or under-tenant, have been so taken.⁴ But an under-tenant, whose goods have been sold under a distress by the original landlord for rent due from his immediate tenant, cannot maintain an action *for money paid* to the use of the latter, because the money never was the under-tenant's; for, on the sale under the distress, the money paid by the purchaser immediately vested in the original landlord.⁵

SECTION III.

DIVISION FENCES AND PARTY WALLS.

§ 183. We have observed, that the tenant, by virtue of his occupation, is generally liable to third persons for the consequences of a neglect to keep up the repairs of division fences, party walls, and highways; his liability in this respect being co-extensive with that of the landlord.⁶ At common law, no person was bound to fence his land against the cattle of another; and, for any trespass they might commit, the owner was answerable, whether they entered from his own close, the close of a third person, or from the highway.⁷ But, by statute, it is now generally provided, that, when

¹ *Payne v. Rogers*, 2 H. Bl. 350.

² *Russell v. Men of Devon*, 2 T. R. 671. Either one or the other, according to circumstances, may be liable for a variety of wrongful acts, which the reader may find enumerated in sections 775, 776, &c.

³ *Sapsford v. Fletcher*, 4 T. R. 511.

⁴ *Exall v. Partridge*, 8 T. R. 308.

⁵ *Moore v. Pyrke*, 11 East, 52. Where a lessee for years abandons the premises, the lessor, for the preservation of the property and the protection of his interests, may collect rent from the under-tenants, and procure new ones, for the benefit of

the lessee; and, if he has never refused to place the property under the lessee's control, on his complying with the lease, such acts will not be considered as a cancelling of the lease; and the lessee and his surety will be bound for the difference between the amount of the rent payable by the lease, and that received from the under-tenants. *Roumage v. Blatrier*, 11 Rob. (La.) 101.

⁶ *Taylor v. Whitehead*, 2 Doug. 745.

⁷ *Stafford v. Ingersol*, 3 Hill, 38. By the laws of New York, 1867, May 9th, it is unlawful for cattle of any description

two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, except where the owner of either of the adjoining lands shall choose to let such land lie open. The exception, however, is by no means a desirable privilege to exercise, for the owner of all domestic animals being bound, at his peril, to restrain them from trespassing upon the lands of his neighbor, is not only precluded, if he neglects to do so, from recovering damages arising from any injury they may sustain by going upon such lands, but is himself liable to make compensation for any trespass they may commit, whether he knows of their vicious propensities or not.¹ Fences, it is said, were designed to keep one's own cattle at home, and not to guard against the intrusion of those belonging to other people. But, whether fenced or not, an owner of land will in no case be justified in injuring domestic animals found trespassing thereon; and, if he does so, he will be liable for all the injury he inflicts. He is only entitled to an action, or may impound the animals, to procure satisfaction for the damage done by them.²

§ 184. By the Statutes of New York, the liability to maintain existing fences that have been once established has been regulated as between the proprietors of adjoining closes; and, unless one of the owners chooses to let his lands lie open, each party is bound to make and maintain one-half of the division fence; and the party, in default, has no remedy for a trespass committed by the cattle of the other. When the party who suffers by a trespass is not in fault, the same statute affords him a remedy, by calling in the fence-

to run at large in any public street, park, place, or highway. And the overseers of highways within their districts, and street commissioners in incorporated villages are required to seize them wherever found, and enforce the penalty prescribed by law. Any private person may also seize any animal trespassing on land owned or occupied by him, or in the highway opposite to his land.

¹ *Holladay v. Marsh*, 8 Wend. 142; *Little v. Lathrop*, 5 Greenl. 356; *Bush v. Brainard*, 1 Cow. 78; *Clark v. Brown*, 18 Wend. 221; *Beckwith v. Shordike*, 4 Burr. 2092; *Angus v. Radin*, 2 South. 815; *Dolph v. Fenis*, 7 W. & S. 367; *Van Leuven v. Lyke*, 1 N. Y. 515. This subject has been fully considered in a case arising in Massachusetts, in which *Parsons, C. J.*, laid down the law with great precision. After stating the principle just mentioned, and that it might be otherwise by force of prescrip-

tion, where such prescription exists, he adds, "If bound by prescription to fence his close, he was not bound to fence it against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was, nevertheless, bound to keep his cattle on his own ground, and prevent them from escaping." The legal obligation of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no agreement has been made, rests entirely on statutory provisions, and trespass will lie against the owner of cattle entering on the grounds of another, though there be no fence to obstruct them, unless he can protect himself by statute, prescription, or agreement." *Rust v. Low*, 6 Mass. 90; *Little v. Lathrop*, 5 Greenl. 356.

² *Matthews v. Fiestel*, 2 E. D. Smith, 90.

viewers, to appraise the ordinary damages, that may accrue to his lands, crops, fruit-trees, shrubbery, and fixtures, connected with the land.¹ This remedy applies only to adjoining owners; and does not extend to injuries sustained by the death of cattle, caused by eating unripe corn in the field of the party who is in default for not keeping up his fence; nor is it intended to take away any previously existing common-law remedy, for such damages as may have been sustained by the negligence or misconduct of a neighbor.² If disputes about the proportions of fence to be made by each arise, they must be settled by the fence-viewers of the place in which the lands are situated; and, then, if either party continues to neglect his proportion of the fence, after a month's notice to repair, the other party may make the fence at the expense of the party neglecting. The effect of the statute requiring each of the owners of adjoining lands to maintain his proportion of the partition fence, after it has been divided, is, to protect each from liability for any trespass committed upon the lands of the other, by reason of any defect in that part of the fence which the other was bound to keep up. If the cattle of the party whose portion of the fence is defective, trespass upon his neighbor in consequence thereof, the latter may have his damages appraised under the statute, instead of resorting to an action of trespass; but he is not bound to adopt this course, and may, if he prefers, still have his common-law remedy.³

§ 185. But unless such a fence has been divided by an agreement between the parties, by a decision of the fence-viewers, or by prescription (that is, by at least twenty years' usage), neither party is obliged to make any particular part of it. There is a joint obligation, by which each is bound to make every part; and, if the fence be defective, each party is chargeable with the deficiency. If either neglects to make or repair his proportion of it,

¹ 1 R. S. 854, § 37, amended by law 1888, p. 253. Where a person shall have chosen to let his land lie open, if he shall afterwards enclose it, he shall refund to the owner of the adjoining land a just proportion of the value, at that time, of any division fence that shall have been made by such adjoining owner; or he shall build his proportion of such division fence. 1 N. Y. R. S. 853, § 31; *Hewitt v. Watkins*, 11 Barb. 409.

² *Stafford v. Ingersol*, *supra*.

³ *Clark v. Brown*, *supra*. The damages which fence-viewers are authorized to as-

certain, are such only as ordinarily accrue from defective fences; and they have no right to assess the value of cattle which escape through a defective fence into a cornfield, and eat so much corn that they die. *Ib.* A zigzag or Virginia fence is not a proper fence. *Herrick v. Stover*, 5 Wend. 580; but see *Ferris v. Van Buskirk*, 18 Barb. 397. As to encroachment of fences upon highway, see *Case v. Thompson*, 6 Wend. 634; *Spicer v. Slade*, 9 Johns. 359; *Fitch v. Comm'rs*, 22 Wend. 182.

after notice, the other may make the whole, and recover the contributory share of the one so neglecting.¹ And upon the escape of cattle from either close into the other, through a defect in any part of the fence, the owner of the cattle is not permitted to allege the escape to be from the deficiency of the other's fence.² If a man's cattle are lawfully placed on A.'s land, and escape thence to the land of another, their owner is entitled to the same exemption from liability, that A. might claim in case the cattle had been his, but nothing more. And when B.'s cattle were rightfully pasturing on A.'s land, and escaped thence to the adjoining land of C., through a defect in the division fence which A. was bound to repair, C. was allowed to maintain trespass against B.³ Although if A. had the care and custody of such cattle for the purpose of depasturing them, he would also have been liable in the same manner, and to the same extent, as the owner.⁴

§ 186. With regard to such animals as are not usually restrained by fences, the owner, whether landlord or tenant, must still keep them on his premises at his peril; and, if they injure his neighbor, he is accountable for the trespass, without regard to the sufficiency of the enclosure. But if they are such animals as are usually restrained by fences, he is not liable for damages if they escape from his premises into his neighbor's land, through the defect of a fence which the neighbor is legally bound to repair.⁵ A dog is also said to be an exception to the rule, for his owner is not liable for his trespasses.⁶ And with respect to a highway, its dedication as such confers no right upon the public to use it as pasture-ground, or for any other purpose. Subject to the right of passage and to make repairs, the soil, together with the grass and other herbage growing thereon, are private property. If cattle, therefore, are placed upon it for the purpose of grazing, and escape into an adjoining close, the owner of the cattle, unless he owns the soil of

¹ *Matter of Rensselaer & S. R. R.*, 4 Paige, 553. Any one occupying land as tenant at will or at sufferance is entitled to the benefit of the statute of division fences, and may maintain an action for the expense of repairing the portion of the adjoining owner. The statute is for the benefit of occupants, without respect to the particular estate enjoyed. *Bronk v. Becker*, 17 Wend. 320. But it applies only in favor of the occupants of adjoining lands. *Stafford v. Ingersol*, *supra*.

² *Rust v. Low*, *supra*.

³ *Stafford v. Ingersol*, *supra*.

⁴ *Barnum v. Vandusen*, 16 Conn. 60.

⁵ *Ibid*; *Shepherd v. Hees*, 12 Johns. 438. The tenant of a land-owner who is bound by contract to maintain the fences along the track of a railroad company cannot recover against the company for an injury to his cattle occasioned by the failure of his landlord to maintain the fences. *Ind. P. & C. R. R. v. Petty*, 25 Ind. 413.

⁶ *Mason v. Keeling*, 12 Mod. 335; s. c. 1 Ld. Ray. 606. Poor Tray's trespasses are usually visited upon his own head without ceremony, by an ounce of lead.

that part of the highway on which he placed them, cannot avail himself of the insufficiency of the fences, in excuse of the trespass.¹ But if, while cattle are being driven along the highway, they stray from the sight of the person having them in charge on adjoining unenclosed land, and he makes fresh pursuit to bring them back, the owner will not be chargeable for this involuntary trespass on the land, nor for the herbage they may crop as they go along.²

§ 187. But no person is bound, either by statute or common law, to keep up a division fence always; for, if he wishes to throw his lands open, he may remove his fences, after having given sufficient notice of his intention. Yet, if he removes his fence without having previously given the three months' notice required by the statute, a party who may be injured thereby is not limited to a suit for the recovery of the actual damages sustained in consequence of such removal; but may, after a month's notice, replace the fence, and recover the expense thereof in an action against his neighbor. If actual damages are sustained, — as the loss of a crop, for instance, — caused by the premature removal of the fence, such damages may be recovered in addition to the expense of the fence.³ But if he gives the required notice, and then removes his portion of the fence, and his cattle pass through the opening upon his neighbor's land, he is liable for the trespass; for the only effect of the statutory permission is to remit the parties to their common-law rights and duties.⁴ So, with respect to the erection of buildings, every proprietor of land, whether he be a landlord or tenant, is his own judge of the propriety of building on it, or leaving it vacant; and, when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material

¹ *Avery v. Maxwell*, 4 N. H. 36; *Wells v. Howell*, 19 Johns. 385. The same principle applies to a common; and, in an action for digging a pit on a common, by reason of which the plaintiff's mare, straying there, fell into the pit and was killed, it was held that no action lay; for the plaintiff had no right in the common, and so, as against him, the digging of the pit was lawful. *Blyth v. Topham*, Cro. Jac. 158. So, where maple-sugar had been left by the defendant in buckets in an open shed on his own unenclosed woodland, and the plaintiff's cow came in the night and drank the syrup, which caused her death, it was agreed by the court, that, although the defendant was guilty of gross negligence, yet the plaintiff, having no right to permit his cattle to go at large on

the defendant's land, could not recover. *Bush v. Brainerd*, 1 Cow. 78.

² *Stackpole v. Healey*, 16 Mass. 35; 1 Archb. N. P. 358. If several animals belonging to different owners unite in doing mischief, each owner is liable for the damage done by his own animal only. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9. And, in the absence of proof as to how much damage was done by each, the presumption is that all the cattle did equal damage. *Partenheimer v. Van Order*, 20 Barb. 479.

³ *Richardson v. McDougall*, 11 Wend. 46.

⁴ *Holladay v. Marsh*, 3 Wend. 142.

he pleases, and is under no obligation of giving his neighbor the use or advantage of his land, by way of support or easement of any description. If a stranger enters upon his unoccupied land, erects buildings, or makes permanent improvements upon it, he is not obliged to recompense the stranger for any portion of the expense on recovering possession of the land. And if the stranger, under these circumstances, should remove such buildings from the land before the owner recovers possession, he is liable in trespass for their value.¹

§ 188. Neither is there any obligation upon the proprietors of adjoining building lots in a city, to unite in building a *party wall* on the dividing line of such lots. The common use of a wall adjoining lands belonging to different owners is indeed *prima facie* evidence that the wall and the land on which it stands, belong to the owners of those adjoining lands in equal moieties as tenants in common.² But if the precise extent of land originally belonging to each can be ascertained, the presumption of a tenancy in common does not arise, and each party is the owner of so much of the wall as stands upon his own land.³ A *party wall*, however, is generally built on the common property of the two owners of adjoining tenements; and it is usually built at the joint expense, each one continuing owner of his land, with an easement or right to the use of the wall. The statute relating to party walls does not make them, nor the land on which they stand, common property: each one owns in severalty the portion of wall standing on his own land, with no qualification, except that neither has a right to pull it down, so long as it remains sound, without the consent of the other. But this principle, it must be observed, applies only to a wall which is admitted to be a party wall; for if one of two adjoining owners places half of a wall on the adjoining lot without an agreement that it shall be built at the joint expense, the owner of the latter is not liable to contribute towards the expense of the wall, even if he subsequently uses that part of it which stands upon his own land. If such a wall is casually destroyed, or becomes ruinous, there is no obligation

¹ *Moore v. Cable*, 1 Johns. Ch. 385; *Gillet v. Maynard*, 5 Johns. 85; *Dewey v. Osborn*, 4 Cow. 329; *Erwin v. Olmsted*, 7 id. 229. No one but the adjoining owner or possessor has any interest in the duty or obligation of another to build or maintain a division fence; and the omission to do so, though the want of the fence results in in-

jury to a third person, gives him no ground of action. *Bronk v. Becker*, 17 Wend. 320; *Ricketts v. E. & W. Ind. Docks Co.*, 12 C. B. 160; *Ryan v. Roch. & S. R. R.*, 9 How. Pr. R. 458.

² *Cubitt v. Porter*, 8 B. & C. 257.

³ *Peyton v. The Mayor*, 9 B. & C. 725.

resting upon either owner to rebuild it, or to unite in building another.¹

§ 189. If one proprietor adds to the height of a party wall, and the other pulls down the addition, the former may maintain trespass against the other for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil.² If either pulls down a ruinous wall, for the purpose of rebuilding, he is bound to reinstate it in a reasonable time, and with the least inconvenience. If it was necessary to repair the old wall, the neighbor is bound to contribute ratably to the expense of the new wall; but he is not bound to contribute towards building it higher than the old one, nor with more costly material: all such extra expense must be borne exclusively by him who pulls down and rebuilds.³ Whether it was necessary to take down and rebuild the wall is always a question for a jury; but, supposing it to be necessary, and that the work is done with proper skill and caution, the right of an owner of a building to take down a decayed and ruinous party wall, for the purpose of rebuilding, after reasonable notice to the tenant of the adjoining building, is unquestioned, and is not affected by the nature of the use and occupation of the adjoining building.⁴

§ 190. The right to use an ancient wall, in support of an adjoining building, stands upon a different footing.⁵ If it was not strictly

¹ *Sherrerd v. Cisco*, 4 Sandf. 480. In this case, a party-wall had been built at joint expense, and was destroyed by fire, and the owner of one of the lots proceeded, without the concurrence of the owner of the other, to build a new wall on the site of the old one. The owner of the other lot subsequently built on his lot, and rested his beams in the new wall; and he was justified by the court in doing so, although he had not contributed to the expense of erecting such wall.

² *Matts v. Hawkins*, 5 Taunt. 20; and see *Bradbee v. Christ's Hosp.* 4 M. & G. 714. An agreement for a party-wall was held not to prohibit the extension of a building beyond it, in front and in the rear. *Wolfe v. Frost*, 4 Sandf. Ch. 72. An agreement between adjoining owners, that one may insert the beams of his building into the other's wall, and pay for the privilege of doing so, is a mere license, without any interest in the land, and need not be in writing. *McLarney v. Pettigrew*, 3 E. D. Smith, 111; *Miller v. Aub. & Sy. R. R.*, 6 Hill, 61; *Pierrepoint v. Barnard*, 6 N. Y. 279.

³ *Campbell v. Mesier*, 4 Johns. Ch.

384; s. c. 6 *id.* 21; *Weld v. Nichols*, 17 Pick. 538. The co-tenant is not liable for the expense of such improvements as are not necessary repairs, made in the absence of a contract express or implied; and no contract will be implied from the mere fact that the improvements were beneficial. *Taylor v. Baldwin*, 10 Barb. 626; *Mumford v. Brown*, 6 Cow. 475; *Putnam v. Ritchie*, 6 Paige, 405.

⁴ *Fartridge v. Gilbert*, 3 Duer, 184; s. c. 15 N. Y. 601. Held otherwise where the plaintiff was a lessee, with a covenant for quiet enjoyment. *Armstrong v. Schermerhorn*, 2 N. Y. Leg. Obs. 40. In New York, Philadelphia, Washington, and other cities, party-walls and buildings are specially regulated by statute. As to the effect of a city custom on this subject, see *Bradbee v. Christ's Hosp.* 2 Dowl. Pr. C. n. s. 164.

⁵ An ancient wall is one that was built to be used, and has in fact been used, as a party-wall for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands. *Eno v. Del Vecchio*, 4 Duer, 53, 63.

a party wall, and the walls of the house pulled down stood wholly on its own lot, yet if the beams of the other house rested upon the wall pulled down, and had done so for a period sufficient to establish an easement by prescription, the owner of the adjoining house would be entitled to have his beams inserted, for a resting-place, in the new wall.¹ But, with respect to a partition wall which is erected partly on each lot, for the purpose of supporting both buildings, each of the owners has an easement in it, for the support of his own house. Neither of them has any right to remove or underpin it, either partially or wholly, unless it can be done without injury to the other's house. And if the owner of two adjoining lots erects buildings on them, with a wall standing partly on each, intended to furnish a support to both buildings, and which is used as such, and makes a conveyance of either house and lots with its appurtenances, he thereby grants an easement for the support of the house conveyed, in so much of the wall as stands on the other lot, and makes it a party wall. After such a grant, neither can remove the wall, nor so deal with it as to render it an inefficient support for the other's building without his consent. If either wishes to improve his own premises, before the wall has become ruinous, or incapable of further answering the purposes for which it was erected, he must do it at his own risk and expense.² In all such cases, neither owner nor occupant can interfere with the wall, to the detriment of the other, without his consent. But where a common wall is erected by tenants for years, although it may be a party wall as between themselves, it will create no easement binding on the owner of the reversion in fee, that can prevent him, when the term expires, from dealing with his property as if no such wall had been erected.³

¹ 8 Kent's Com. 487. The corporation of the city of New York, by an ordinance of 1833, have regulated partition fences and walls. It requires them to be made and maintained by the owners of the land on each side; and, if the same can be equally divided, each party shall make and keep in repair one-half. Disputes concerning the division of the wall, and the parts to be made and repaired by each, or as to its sufficiency, are to be settled by an alderman or assistant of the ward. If the wall cannot be conveniently divided, it is to be made and kept in repair at the joint expense. So much of the wall as is higher or lower than the city regulation, to be at the individual expense of the

owner. And, on neglect of one party to contribute, the other may make the whole wall, and recover from his co-tenant his proportion of the expense.

² *Eno v. Del Vecchio*, 4 Duer, 58; s. c. 6 *id.* 17; *Bradbee v. Christ's Hosp.* 4 M. & G. 714; *Hide v. Thornborough*, 2 C. & K. 250. Where the owners of adjoining lots by agreement construct a wall partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, becomes a party wall in the legal sense of the term, and the owner of each house has an easement for its support in that portion of the wall which stands on the adjoining lot.

³ *Webster v. Stevens*, 5 Duer, 553.

§ 191. As a man may abate an encroachment on his property, he may cut the roots of a tree so encroaching, in the same manner that he may lop its overhanging branches.¹ If the tree grows in a hedge, dividing the land of two persons, with the roots extending into the land of each, they are tenants in common of the tree; but if it stands on my side of the line, and the roots grow in my land, the whole property of the tree is in me, though the boughs overshadow his land; and although my neighbor may have a right to cut away the branches or the roots on his side, he has no right to convert either the branches or the fruit to his own use.² And if line-trees are destroyed by one of the adjoining proprietors, he is liable to an action of trespass, in favor of the other, whether the interest of such other be several, or that of a tenant in common.³ A man may, also, justify an entry on his neighbor's land, to retake his own property, which has been removed thither by accident. As in the instance of fruit falling upon the ground of another; or in that of a tree which is blown down, or through decay falls into the ground of a neighbor; in which cases the owner of the fruit, or of the tree, may show the nature of the accident, and that he was not responsible for it, and thus justify the entry. If, however, the fruit, or the tree, had fallen in that particular direction, in consequence of the owner's act, or negligence, he could not justify the entry.⁴

SECTION IV.

LIABILITY FOR NEGLIGENCE.

§ 192. The tenant's general obligation to repair also renders him responsible for any injury a stranger may sustain, by his neglect to keep the premises in a safe condition; as by not keeping the covers

¹ Jones v. Powell, Palm. 586.

² Welch v. Nash, 8 East, 894; Dyson v. Collick, 5 B. & A. 600; Beardslee v. French, 7 Conn. 125; Lyman v. Hale, 11 id. 177. The case of Master v. Pollier was an action "of trespass *quare clausum fregit et asportavit* the plaintiff's boards. The defendant justified, that there was a great tree which grew between the close of the plaintiff and that of the defendant, and that part of the roots of the tree entered into the close of the defendant, and were nourished by his soil; that the plaintiff cut down the tree, carried it into his own close, and sawed it into boards, and the defendant

entered, and took and carried away some of the boards *prout ei bene licuit*. On demurrer to the plea, it was contended to be bad; for, although some of the roots of the tree are in the defendant's soil, yet the body of the tree being in the plaintiff's soil, all the residue of the tree belongs to him also. And of this opinion is Bracton; but if the plaintiff had planted a tree in the soil of the defendant, it shall be otherwise; *quod curia concessit*." Rolle, 114. See also Betts v. Lee, 5 Johns. 348.

³ Dubois v. Beaver, 25 N. Y. 128.

⁴ Per Tindall, C. J., in Anthony v. Haney, 8 Bing. 192.

of his vaults sufficiently closed, so that a person walking in the street falls through, or is injured thereby.¹ If he places any unreasonable obstruction in the highway adjoining his premises, or unreasonably neglects to remove an obstruction therefrom, he will be liable to be indicted for a public nuisance, as well as to an action for damages at the suit of an individual injured. If he repairs or improves the building, he must guard against accidents to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of danger.² The law will tolerate such a partial and temporary obstruction as may be necessary for purposes of business, as in receiving and delivering goods from a warehouse, or the like, provided the public convenience does not suffer. In a case which arose in Philadelphia, the defendant was indicted for a nuisance in placing goods on the foot-way and carriage-way in a public street, and suffering them to remain for the purpose of being sold at auction, so as to render the passage less convenient, but not entirely to obstruct it. Mr. Chief Justice Tilghman, delivering the opinion of the court, says, "The necessity which justifies such a nuisance must be a reasonable one. No one has a right to throw wood or stone in the street at his pleasure; but, forasmuch as fuel is necessary, he may throw wood in the street for the purpose of having it carried into his house, and, may be there a reasonable time. So, because building is necessary, stones, brick, lime, and other materials, may be placed in the street, provided it can be done in a convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them into his store in a reasonable time; but he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it."³

¹ *Cheatham v. Hampson*, 4 T. R. 318. Persons who cause to be constructed an area under a highway are bound, at their peril, to keep it so covered that the way would be as safe as before the area was built; and when the covering, from any cause, becomes unsafe, they are responsible. It is no defence that the covering was done by contractors, who agreed to make it safe; or that the covering became unsafe by the wrongful act of a third party. *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, *ib.* 84.

² Where work is done under a special contract, and an injury to an individual accrues from the negligence of the contractor's servants, the owner or employer

is not responsible upon the principle of *respondet superior*. *Vanderpool v. Husson*, 28 Barb. 196; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. The Mayor*, 8 N. Y. 222. Where the owner of several lots, upon the rear of which were tenements, commenced to build upon the front, and opened a way through an adjoining lot for his tenants, of which he notified them; held, that a visitor who, in attempting to enter the tenements, passed into the unfinished buildings in the night-time, and fell through the floor and was injured, could not recover for his injuries. *Roulston v. Clark*, 8 E. D. Smith, 366.

³ *The Commonwealth v. Passmore*, 1 S. & R. 217. Any unauthorized contin-

§ 193. It is well settled, also, that no man can habitually carry on any part of his business in the street, to the annoyance of the public; and if the nature of his business is such as to require more room than is contained upon his own premises, he must either enlarge them, or remove his business to some more convenient spot. Private interests must be made subservient to the general interests of the community, which is not to be prevented from passing freely along the highway. Thus, where the defendant, being a lumber merchant, occupied a small yard close to the street, and, from the smallness of his premises, was obliged to deposit long pieces of lumber in the street, and to have them sawed up there, before they could be carried into his yard, it was suggested to be necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican; but Lord Ellenborough said, "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconveniences occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant in this case is not to *eke out the inconvenience of his own premises by taking in the public highway into his lumber yard*; and if the street be narrow, he must remove to a more commodious situation for carrying on his business."¹

uous obstruction to the free passage of the public along a street, amounts to a nuisance. *Davis v. The Mayor, &c.* 14 N. Y. 506. As for a waggoner to keep one or more wagons constantly before his storehouse, in the street, although there was sufficient room for two carriages to pass abreast on the opposite side of the street, *King v. Russell*, 6 East, 427. Or for a coachman to stand with his coach in any particular part of the street for an unreasonable length of time waiting for passengers, *Rex v. Cross*, 3 Camp. 224. Or for a man to erect a wharf on the public property, although its erection might be beneficial, and sufficient room be left for a free passage in the river, *Resp. v. Caldwell*, 1 Dall. 150. Or to divert part of a public navigable river whereby its current was weakened, and made unable to carry

vessels of the same magnitude as before. *King v. Mansfield, Noy*, 108; *Hart v. The Mayor*, 9 Wend. 571. See *post*, as to nuisance, §§ 200-207.

¹ *The King v. Russell*, 6 East, 427; *Rex v. Carlile*, 6 C. & P. 686; *Rex v. Jones*, 3 Camp. 230. In repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable; for if the owner employs his own servants, or even contracts with a builder to repair his house, and the latter erects a shed so far out into the street as to encroach unreasonably on the highway, the owner will be liable for the nuisance. *Bush v. Steinman*, 1 B. & P. 407. But building a house higher than it was before, whereby the street becomes darker, is not a public nuisance on account of the darkening only. *Rex v. Webb*, 1 Id.

§ 194. And a tenant will be responsible for an obstruction, if he furnishes the occasion, or does an act which is likely to cause others to assemble around his premises, and produce such obstruction in the street. The defendants were accordingly held guilty of a nuisance, in a case which arose in the city of Brooklyn, for causing the street in front of their distillery, in that city, to be obstructed by carts and teams, remaining therein an unreasonable time, waiting for an opportunity of loading with swill and slops from the distillery; although the defendants themselves used all reasonable diligence and despatch in the delivery, and were in the pursuit of a legal business. And the fact that the teams and carriages were not owned by the defendants, nor under their control, does not excuse them, if they in effect, by the manner of conducting their business, invite such assemblages at the place where the article is delivered. Nor will any length of time enable a party to prescribe for a public nuisance, and it is therefore immaterial how long the practice had prevailed, or when the distillery was built.¹

§ 195. A person is liable also in damages for keeping a dog upon his premises which is accustomed to bite mankind; even although it may not be his, if he harbors or allows it to be at, and resort to, his premises;² but he must be aware that the dog was accustomed to bite.³ A man cannot recover damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action of trespass; as if he was in the pursuit of

Ray. 737. As to what encroachments upon a highway amount to a nuisance, see *Peckham v. Henderson*, 27 Barb. 207.

¹ *The People v. Cunningham*, 1 Den. 524; in an able opinion of Mr. Justice Jewett. Where that which is done by a person on his own land is illegal and punishable as such; or, although not illegal, if it be an act which may probably endanger human life, as the setting of spring-guns, he may be responsible even to a voluntary trespasser for injuries thus sustained. *Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, 8 M. & W. 782. But even in such a case, if the plaintiff had notice that deadly engines were placed in a wood into which he, notwithstanding, entered and was severely wounded, it was held he could not maintain an action, having voluntarily brought the injury upon himself. *Hott v. Wilkes*, 8 B. & A. 304.

² *McKone v. Wood*, 5 C. & P. 1.

³ *Hogan v. Sharpe*, 7 C. & P. 765; *Jenkins v. Turner*, 1 Ld. Ray. 109; *Rex v. Huggins*, 2 *id.* 1588; *Van Leuven v. Lyke*, 1 N. Y. 515. Where a dog, which has the vicious habit of attacking and biting other dogs without being incited to do so, is suffered to go at large, and he attacks and bites the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, if it appears that such owner had knowledge of the viciousness of the dog. Vicious dogs are a nuisance, and their owners must either kill them, or confine them as soon as they have notice of their dangerous habits, or answer in damages for injuries inflicted by them. *Wheeler v. Brant*, 28 Barb. 324.

his ordinary business. And if he was lawfully upon the premises, the circumstance of there being a notice, warning persons to beware of the dog, will be no answer, if it appears that he was not able to read it.¹ So a warning, previously given, is no excuse, if the jury should think that the accident was not occasioned by the plaintiff's own carelessness or want of caution.² The owner of sheep, however, which had been worried by a dog in a field, is not justified in shooting the dog, when in another field some distance off; as it cannot be said to be done in protection of his property.³ The plaintiff, wherever it is necessary to prove a *scienter*, as in the case of a dog, must allege that the defendant knew that the dog was accustomed to commit the particular tort complained of; an allegation of a knowledge of general ferocity is not, it would seem, sufficient to charge the defendant.⁴

§ 196. By the common law, if a fire began in a dwelling-house, and it extended to the neighboring property, the tenant of the house where the fire originated was responsible for all damages done, whether the fire was caused by the mischance of himself, his servant, or his guest. And an action on the case would always lie by a lessee for years against his under-tenant, for so negligently keeping his fire that the premises were burned down.⁵ But the statute of 14 Geo. III. c. 78, enacted that no action should be had against any person, in whose house, chamber, or other building, or on whose estate, any fire should accidentally begin; and this statute has been generally re-enacted in the United States. The protection afforded by these statutes, however, extends only to a case of accidental fire, that is, one which cannot be traced to any particular or wilful cause, and stands opposed to the negligence of either

¹ *Sarch v. Blackburn*, 4 C. & P. 297; *s. c.* *Mood. & M.* 505; *Blackman v. Simons*, 8 C. & P. 138; *Howland v. Vincent*, 10 Metc. 371.

² *Curtis v. Mills*, 5 C. & P. 489. In the cases of *May v. Burdett*, 9 Q. B. 101; and *Jackson v. Smithson*, 15 M. & W. 568; the judges held that the keeper of any mischievous animal dangerous to his neighbor is bound to keep it securely at his peril; and if any injury is done by it, negligence in the owner is presumed to have been the cause of the injury; for that there is negligence in keeping it, after notice of its propensities.

³ *Wells v. Head*, 4 C. & P. 568. A ferocious dog, that attacks persons, is a nuisance; and, if allowed to run at large, may be killed by any one. *Putnam v.*

Payne, 18 Johns, 312; *Hinckley v. Emerson*, 4 Cow. 351.

⁴ *Hogan v. Sharp*, 7 C. & P. 755; *Hartley v. Harriman*, 1 B. & A. 620; *Beck v. Dyson*, 4 Camp. 198; *Jackson v. Pesked*, 1 Maule & S. 238.

⁵ "Si mon feu per misfortune arde les biens d'autre home, il avera action sur le case vers moy.—2 Hen. IV. 18." Roll. Abr. Action on Case, B. p. 1; *Tubervil v. Stamp*, 1 Salk. 13. The Revised Statutes of New York (1 R. S. 696, § 1) also provide that any person negligently setting fire to his own woods, or negligently suffering a fire kindled upon his own wood, or fallow land, to extend beyond his own land, shall forfeit treble damages to the party injured thereby. *Lawyer v. Smith*, 1 Den. 207.

servants or masters; and therefore an action still lies against a person upon whose premises a fire commences, through the negligence of himself or his servants, and is productive of injury to his neighbor.¹ And a tenant is still answerable to his lessor if the house or other building on the demised premises is destroyed by fire, through his carelessness or negligence; and, in such case, he is bound to rebuild, at his own expense, within a reasonable time.² As a general rule, also, if a man, acting according to the best of his skill, and with ordinary prudence, makes an improvement on his land, and not foreseeing that it will produce an injury to his neighbor, unwittingly injures him, he is still answerable for the damage.³ Thus where an action was brought by the plaintiff, for an injury to his reversion occasioned by the defendant making a rick of hay on his land, so near some cottages of the plaintiff that they were burned by the spontaneous ignition of the hay. It was proved that the hay was put up in a damp or green condition, when, as is well known, it will, from natural causes, ferment and ignite: the court held, that the law requires every man so to use his own property as not to injure or destroy that of his neighbor, and rendered him liable for all consequences, resulting from a want of due care and caution, in the manner of enjoying his own rights; since an ordinary degree of prudence would have prevented the accident, or suggested the propriety of placing his hay-ricks further off from his neighbor's premises.⁴

§ 197. It is a sound legal maxim, that requires every person so

¹ *Filliter v. Phippard*, 11 Q. B. 847; 1 Bl. Com. 481, to the contrary. A tenant is not liable, in the absence of an express agreement, for the accidental destruction by fire of the buildings occupied by him. *Wainscott v. Silvers*, 18 Ind. 497.

² Co. Lit. 53, b; *Rook v. Warth*, 1 Ves. sr. 462. In the case of *Clark v. Foot*, 8 Johns. 421, Clark sued Foot to recover damages sustained by Foot's setting fire to the plaintiff's woods. The evidence was that the defendant's servant by defendant's order, set fire to certain fallow ground belonging to the defendant, which fire ran into the plaintiff's woodland. The court said the question was whether there was negligence on the part of Foot or his agent; for Foot was as much accountable for the negligence of his servant, whilst employed in his business, as if the fire had spread by his own act. It is lawful for a person to burn his fallow; but, if his neighbor is injured thereby, he will

have a remedy by action on the case, if there be sufficient ground to impute the act to the negligence or misconduct of the defendant or his servants. See also *Maull v. Wilson*, 2 Harringt. 448.

³ *Barnard v. Poor*, 21 Pick. 378; *Todd v. Collins*, 1 Halst. 127. Plaintiff's wood was on the defendant's land, and defendant having given plaintiff a reasonable notice of his intention, and requiring him to remove it, set fire to his fallow, and the wood still remaining upon the land was burned; and the defendant was held not to be liable for any damages, in the absence of wilful wrong or gross negligence. *Bennett v. Scutt*, 18 Barb. 347. In case of damages from burning fallow, the mere fact that the fire was set in a dry time, in July, upon low swampy ground, previously burnt over and destitute of brush, does not show negligence. *Stuart v. Hawley*, 22 Barb. 619.

⁴ *Sutton v. Clarke*, 6 Taunt. 44; *Cook v. The Champlain Transp. Co.* 1 Den. 91.

to use his own rights and property, as to do no injury to those of his neighbor; and the law does not so much regard the intent of the actor, as the loss and damage of the party suffering. Upon this principle, a person acting in the exercise of his undoubted right of property, and doing a damage to his neighbor, which, under other circumstances, might be justifiable, will still be liable to an action, if the damage might have been prevented by the use of reasonable care and precaution on his part. Thus, if a man lops a tree, and the boughs fall upon another; or if he has land through which a stream runs, that turns his neighbor's mill, and he lops the trees growing on its side, so that they accidentally impede the progress of the stream, and hinder the mill from working, he will be liable for all damages. Or if, in building his own house, a piece of timber falls on the neighboring house, and injures it; or if a man assaults him, and, in lifting up his staff to defend himself, it strikes another, an action lies, although he did a lawful thing; for the reason, that he who receives damage ought to be recompensed.¹ For a similar reason, a shopkeeper, who invites the public to his shop, is liable for neglect on leaving a trap-door open, without any protection, by which his customers suffer injury.²

§ 198. Wherever, from the situation of the premises, the acts of a person, though done entirely on his own property, may be productive of injury, he is bound to exercise such a degree of care and caution as shall prevent other persons, exercising reasonable care on their part also, to avoid the danger. But if he has used such caution, he will not be liable for an injury arising from the interference of a wrong-doer. Thus, in an action for negligently permitting the flap of the defendant's cellar to remain unfastened, whereby it fell upon and broke the plaintiff's legs, the chief justice, in delivering the opinion of the court, said the defendants were bound to use such precautions as would, under ordinary circumstances, have prevented the flap from falling down; but if it was so secured, and a third person, over whom they had no control, came and removed it, the defendant would not be liable;

¹ *Vaughan v. Menlove*, 3 Bing. N. C. 468. See also *Rex v. Comm'rs*, 8 B. & C. 865; *Wyatt v. Harrison*, 8 B. & Ad. 871; *Aldridge v. Great-West. R. R.*, 4 Scott, N. R. 156.

² *Parnaby v. Lancaster Coal Co.*, 11 Ad. & E. 223-248. No liability, however, results from the commission of an act arising

from inevitable accident, or which ordinary human care and foresight are unable to guard against. *Weaver v. Ward*, Hob. 134; *Gibbons v. Pepper*, 4 Mod. 406; *Wakeman v. Robinson*, 1 Bing. 213; *Bullock v. Babcock*, 8 Wend. 391; *Harvey v. Dunlop*, Hill & D. 193; *Center v. Finney*, 17 Barb. 94.

and that the question for the consideration of the jury was, whether the defendant and his servants did use due and ordinary care in securing the flap, so as to prevent an accident. It might have been secured by a string or hook, it is true; but a tradesman, under such circumstances, is not bound to adopt the strictest means. He is only bound to use such care as a reasonable man, looking at it, would say was sufficient; and if he does use such care, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable, but the party must look for compensation to the wrong-doer who displaced it.¹ And in another case, against a publican, for leaving open a trap-door on the pavement, in the evening, after the lamps were lit, he having just previously opened it for the purpose of admitting a barrel of beer into his cellar, the court held that the case turned upon whether a proper degree of caution had been used by the defendant. That if he had not exercised such a degree of care in using his cellar as would prevent a reasonable person, acting also with an ordinary degree of care, from receiving any injury, he would be liable; but not, however, unless the plaintiff himself had used due caution in the matter, and was not guilty of negligence in running into danger.²

§ 199. As a general rule of law, also, it may be stated, that, in cases of damage arising from accidents of the character we have been considering, where there is equal negligence on both sides, without any intentional wrong on the part of either, or if the plaintiff, whether by his own negligence or otherwise, has contributed, substantially, to produce the accident, no action lies.³ But while

¹ *Daniels v. Potter*, 4 C. & P. 282. Negligence is defined to be, any violation of the obligation which enjoins care and caution in what we do. It is the omission of a duty. *Tonawanda R. R. v. Munger*, 5 Den. 256; *Carroll v. N. Y. & N. H. R. R.*, 1 Duer, 571, 583. And see *Mayor v. Bailey*, 2 Den. 433; *Brand v. Schenect. & T. R. R.*, 8 Barb. 368; *Chase v. N. Y. Cent. R. R.* 24 *id.* 273.

² *Proctor v. Harris*, 4 C. & P. 337. *Ordinary care* means that care and foresight which men of ordinary prudence are accustomed to make use of. *Johnson v. Huds. Riv. R. R.*, 6 Duer, 633; while *ordinary neglect* is the omission of that care which every man of common prudence takes of his own concerns. *Scott v. Depyster*, 1 Edw. 518.

³ *Brownell v. Flagler*, 5 Hill, 282; *Wilds v. Huds. Riv. R. R.*, 24 N. Y. 430; *Sills v. Brown*, 9 C. & P. 605; *Wynn v. Allard*, 5 W. & S. 524; *Smith v. Dobson*, 3 M. & G. 59; *Brown v. Maxwell*, 6 Hill, 592; *Rathbun v. Payne*, 19 Wend. 399. One who complains of another's negligence should himself be without fault; and where a plaintiff, at the time of the alleged injury, was trespassing on the defendant, or otherwise wrong in the particular act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence. *Brownell v. Flagler*, *supra*; see *Cook v. Champl. Transp. Co.*, 1 Den. 99; *Tonawanda R. R. v. Munger*, *supra*; *Kelsey v. Barney*, 12 N. Y. 425.

a party, on the one hand, cannot recover damages for an injury which he has brought upon himself, neither will he, on the other, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed materially to produce the injury; and, even then, it would seem that the party setting up such defence is bound to use common and ordinary caution to be in the right.¹ If, however, a person, in the lawful use of his property, exposes it to accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons. Thus the owner of land on the shore of a stream or lake, or adjoining the track of a railroad, may lawfully build thereon, though the situation be one of exposure and hazard; and he is, nevertheless, entitled to protection against the negligent acts of persons wilfully passing the same with vessels or carriages propelled by steam-engines, by which such buildings are set on fire. And, in an action for the damages he sustains, it is competent for the plaintiff to show that experienced persons, in such employments, were accustomed to use precautions which the defendants neglected; the tendency of such evidence not being to establish a local law or usage.²

SECTION V.

OF NUISANCES.

§ 200. The tenant's possessory interest will enable him to maintain actions growing out of any act by which his possession is immediately affected, or the consequences of which are in any way injurious to his possession.³ And such actions may be, either to recover damages for an injury already sustained, or for an injunction to prevent further injury, or both. The injury may be, either to the dwelling-house by rendering it uncomfortable or untenable; or to the land, as by overflowing it with water; or to some

¹ N. H. St. & Tr. Co. v. Vanderbilt, 16 Conn. 420. For case of concurring negligence, see Owen v. Huds. Riv. R. R., 2 Bosw. 374. If the plaintiff has used ordinary care, he cannot be said to have contributed to the negligence. Center v. Finney, 17 Barb. 94; Eakin v. Brown, 1 E. D. Smith, 86. And that this doctrine

is to be cautiously applied, where the fault of the defendant has been clearly established, see Clark v. Kirwan, 4 E. D. Smith, 21.

² Cook v. Champlain Transp. Co., 1 Den. 91.

³ Evans v. Evans, 2 Camp. 491; ante, § 178.

incorporeal hereditament annexed to the estate, as the obstruction of a right of way.¹ And, if the injury affects the reversion, both landlord and tenant may have distinct actions for the same wrongful act; as for an injury to trees, the landlord for injury to the body of the tree, and the tenant in respect to its shade or fruit.² If the trees have been cut down, the tenant may have an action of trespass against the wrong-doer for breaking in upon his premises, and the landlord an additional action of trover for the trees carried away.³ An action of trespass also lies in favor of the tenant, if a man builds a house so close to his that the roof overhangs, and throws the water upon it; or if a person erects any thing offensive so near his dwelling as to render it useless or unfit for habitation; as, for instance, a pigsty, lime-kiln, smith's forge, tobacco-mill, tannery, or privy.⁴

§ 201. Any offensive erection, which, from its nature, may be an annoyance, and from its situation actually becomes so, is a nuisance. Thus it has been held, that a slaughter-house in a city is, *prima facie*, a nuisance to the neighborhood; and that, to constitute it such, it is not necessary that the noxious business should endanger the health of the neighborhood. It is sufficient if it be offensive to the senses, and renders the enjoyment of life uncomfortable.⁵ Upon this principle, a coal-yard may be so negligently conducted as to become a nuisance to the neighboring inhabitants,

¹ *Trower v. Chadwick*, 8 Bing. N. C. 334; *Panton v. Holland*, 17 Johns. 92; *Dodd v. Holme*, 1 Ad. & E. 498; *Thurston v. Hancock*, 12 Mass. 220; *Acton v. Blundell*, 12 M. & W. 824.

² *Bedingfield v. Onslow*, 3 Lev. 209; *Starr v. Jackson*, 11 Mass. 519; *Shadwell v. Hutchinson*, 4 C. & P. 838.

³ *Berry v. Heard*, Cro. Car. 242; 2 Inst. 308.

⁴ *Aldred's case*, 9 Co. 59, a; *Penraddock's case*, 5 *id.* 100; *Wynn v. Alard*, 5 W. & S. 524; *Howel v. McCoy*, 3 Rawle, 256.

⁵ *Catlin v. Valentine*, 9 Paige, 575; *State v. Purse*, 4 McCord, 472. Nuisance, in its largest sense, signifies any thing that worketh hurt, inconvenience, or damage. 3 Bl. Com. 215. It is either public, annoying all the members of a community, or it is private, injuriously affecting the lands, tenements, or hereditaments of an individual. To make a noxious trade a nuisance, it is not necessary that it should endanger the health of the neighborhood. It is sufficient if it produces that degree of annoyance which is offensive to the senses,

and impairs the enjoyment of life and property. *Catlin v. Valentine*, *supra*; *Brady v. Weeks*, 8 Barb. 157; *Rex v. Neil*, 2 C. & P. 485. A fat-boiling establishment is a nuisance if it infects the air with noisome smells and gases, prejudicial to health. *Cropey v. Murphy*, 1 Hilt. 126. But whatever is permitted by a statute, which the legislature is competent to enact, is not in judgment of law a nuisance. *Leigh v. Westervelt*, 2 Duer, 618; *Harris v. Thompson*, 9 Barb. 850; *Plant v. L. I. R. R.*, 10 *id.* 26; *Williams v. N. Y. C. R. R.*, 18 Barb. 222. Any excess or irregularity in the exercise of a power conferred by statute, however, may be a nuisance *pro tanto*. *Renwick v. Morris*, 7 Hill, 575; *Adams v. Beach*, 6 *id.* 271. The legislature declared a stream to be a public highway, and afterwards enacted a law authorizing the riparian owners to erect a dam across it; held, that the latter act merely restored the common-law right of the owners to obstruct the navigation, but did not legalize the dam if otherwise a nuisance. *Clark v. The Mayor*, 18 Barb. 32.

although it is not necessarily such ; and only becomes so by being so carelessly used as to become obnoxious to the neighborhood.¹ So the act of keeping a large quantity of gunpowder in a wooden building, insufficiently secured, and situated near other buildings, thereby endangering the lives of persons residing in the vicinity, amounts to a public nuisance.² And if an accident occurs, by which an individual is wounded, he may recover damages against the party guilty of the nuisance, although the fire may not have been occasioned by any negligence of the defendant.³ Even a private dwelling-house may be kept in so negligent and filthy a manner as to become a nuisance.⁴

§ 202. It is a well-settled principle, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property ; but this right is qualified and limited by an equal right in others to enjoy the possession of their property also. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of his neighbors, even for the purpose of a lawful trade. Thus he may make an excavation on his own land, but not so near to mine as to cause my land to slide into his canal : nor may he cast the dirt or stones upon my land, either by human agency or the force of gunpowder. If he cannot construct his work without adopting means that will injure his neighbor, he must abandon that mode of using his property, or will be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful way, although the work is done in the most careful and skilful manner.⁵

¹ *Barrow v. Richard*, 8 Paige, 351. *Russell v. Popham*; N. Y. Leg. Obs. 272. Gas-works are not within the ordinary uses of real estate, and, whenever they produce a special injury, are to be regarded as a nuisance, and an action will lie in favor of the injured person. *Carhart v. Aub. Gas-light Co.*, 22 Barb. 297. And it is sufficient to show that the property has been rendered less valuable for the purposes to which the owner has seen fit to devote it. *First Bapt. Church v. Schenect. & T. R. R.*, 5 Barb. 79; *Trustees v. Utica & S. R. R.*, 6 *id.* 313. Stationing before the door of a mock-auction room a man with a placard inscribed "Beware of mock auctions," was held to be a private nuisance, in *Gilbert v. Mickel*, 4 Sandf. Ch. 357.

² *People v. Sands*, 1 Johns. 78.

³ *Myers v. Malcomb*, 6 Hill, 292; *Rex v. Taylor*, 2 Stra. 1167; *Duncan v. Thwaites*, 8 B. & C. 556; *Pierce v. Dart*, 7 Cow. 609;

⁴ *Wend. 25*; *Mayor v. Furze*, 3 Hill, 612. ⁵ *State v. Purser*, *supra*. The tenant of premises is alone liable for a nuisance resulting from his own act or negligence in the use of the premises ; but for a nuisance resulting from the structure of the building the owner is liable. But as to an open area in front of the building, both owner and occupant are bound to render it safe to the public. *Durant v. Palmer*, 5 Dutch. 544.

⁵ *Hay v. The Cohoes Co.*, 2 N. Y. 159; *Tremain v. Same*, *ib.* 163; *Aldred's case*, 9 Co. 58; *Rol. Abr.* 565.

Upon the same principle, the owner of a house and lot who constructs a vault within the limits of the street in front thereof, and covers the same with flagging so as to form the sidewalk, acts at his peril; and is responsible for all injuries resulting from its want of entire safety for all purposes for which the public have a right to use such sidewalk.¹

§ 203. It must not, however, be inferred that an action can be maintained for a thing which merely puts another to inconvenience. Some actual damage must be sustained by the party complaining; thus the mere act of diverting a watercourse, erecting a privy, or the like, is not sufficient to sustain an action, if it does no real injury to the plaintiff's inheritance or possession.² So the building of a wall which intercepts a prospect, without obstructing the light, or the opening of a window whereby the privacy of a neighbor is disturbed, are not actionable; the only remedy in this latter case is to build on the adjoining land, opposite the offensive window.³ The injury must also be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved. As, if the boughs of my tree grow over your land, you may cut them off; but you are not justifiable in cutting them before they grow over your land, for fear they should grow over.⁴ So if a Chandler erects a melting-house, it is a common nuisance; but if a man is

¹ *Congreve v. Morgan*, 5 Duer, 495. It is no defence to an action for an injury sustained by the breaking and falling-in of the covering of such a vault, that the owner was not guilty of negligence in the manner of its construction. Nor can the owner defend on the ground that the work was actually done by a third person, with whom he had contracted for its performance, although the terms of the contract required the contractor to use stones, for such covering, in all respects sufficient. Nor will he protect himself by showing, that the covering had answered the purpose for which it was intended for a year after the completion of the work, and that he had no knowledge that the covering was insufficient. How far, in the city of New York, where such matters are regulated by a city ordinance, an authority from the corporation would affect in such cases the owner's liability, the judges in this case suggest a *quære*; and intimate that if such authority were shown, the liability of the owner might depend upon the question of negligence in the performance of the work.

² *Lansing v. Smith*, 8 Cow. 146; *Myers v. Malcomb*, *supra*; *Duncan v. Thwaites*, *supra*; *Mayor v. Henley*, 3 B. & Ad. 77; *Mills v. Hall*, 9 Wend. 815. Where the nuisance consisted in maintaining piles of wood on the street, constituting the bulk-head in front of the plaintiff's storehouse, injury to the rental of the storehouse is an injury which it suffers in common with all other property in the neighborhood, and will not sustain an action. *Dougherty v. Bunting*, 1 Sandf. 1. The injury must not only be special in its character, but must be peculiar to the plaintiff, and not common to himself and others. *Butler v. Kent*, 19 Johns. 228.

³ Per *Eyre, J.*, *Chandler v. Thompson*, 8 Camp. 82; *Cross v. Lewis*, 4 D. & R. 234; *Knowles v. Richardson*, 1 Mod. 55; *Aldred's case*, *supra*. That a man has a right to build a fence on his ground for the purpose of shutting up the window of a neighbor, see *Pickard v. Collins*, 23 Barb. 444; *Mahan v. Brown*, 18 Wend. 281; *Parker v. Foote*, 19 *id.* 309.

⁴ Per *Coke, J.*, in *Norris v. Baker*, 1 Rolle, 394.

so tender-nosed that he cannot endure sea-coal, he ought to leave his house.¹ Or if a man sets up a school so near my study, who am of the legal profession, that the noise interrupts my studies, no action lies.²

§ 204. Nor will an action lie for a reasonable use of a person's undoubted right, although it may be to the annoyance of another; as if a butcher or brewer exercises his trade in a convenient place.³ Nor was it considered actionable in a case where a defendant kept six or seven pointers so near the plaintiff's dwelling-house that his family were prevented by their noise from sleeping during the night, and were very much disturbed in the day.⁴ So the erection of a mill above another mill, whereby the owner of the lower mill is obliged to extend his dam, and is subjected to inconvenience in floating timber to his mill, but which does not affect his supply of water, is not actionable.⁵ And if the injury in such a case is trivial, the law will not afford redress: but it will interpose, to prevent the lower mills being rendered useless or unproductive in any considerable degree.⁶

§ 205. Although, generally, some injury must have been sustained before redress can be had, yet if the necessary consequence of what has already been done will be an injury, it is not necessary to wait until actual damage shall have accrued, before proceeding to the appropriate remedy. As, if a party intending to build a house, which will obstruct my ancient lights, erect fences of timber for the purpose of building, I have no right to pull them down; but if the eaves of the house, when built, will evidently project over my land, I need not wait till water actually falls from them, but may pull them down at once, or may apply to a court of

¹ Per Doddridge, J., in *Jones v. Powell*, Palm. 536; *Hall v. Swift*, 6 Scott, 167; *Bower v. Hill*, 1 Bing. N. C. 549.

² Com. Dig. Action on Case for a Nuisance. A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. *Boom v. Utica*, 2 Barb. 104. Neither is a billiard table. *The People v. Sergeant*, 8 Cow. 139.

³ Conn. 305; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bliss v. Hall*, 4 *id.* 183; *Flight v. Thomas*, 10 Ad. & E. 590.

⁴ *Street v. Tugwell*, B. R. M. T. 41 Geo. III. But a dog in the habit of coming on a man's premises, barking and howling to the annoyance of his family, is a

nuisance, and may be killed after reasonable notice to the owner. *Brill v. Flagler*, 28 Wend. 354.

⁵ *Palmer v. Mulligan*, 8 Caines, 307; *Sackrider v. Beers*, 10 Johns. 241. Though a person has a right to erect a mill on his own ground where he pleases, yet he must so exercise that right as not to interfere with the existing rights of others; and therefore if A. erects a new mill in such a place, or so near the mill of B. that an artificial dam, before erected by B., causes the water to flow back on A.'s mill and obstruct its movement, A. has no right to complain of B.'s dam as a nuisance. *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

⁶ *Merritt v. Brinkerhoff*, 17 Johns. 306; *Stiles v. Hooker*, 7 Cow. 266.

equity to prohibit the impending injury. Mere threats, however, unaccompanied by an act, do not amount to a disturbance.¹

§ 206. If the owner of land, on which a nuisance has been erected, lets the land, or if a tenant, having created a nuisance, underlets it, and the nuisance is continued, an action for the damage caused by its continuance will lie, at the option of the injured party, either against the landlord or the tenant; because, by letting the land with the nuisance, he affirms it, and the continuance amounts to a fresh nuisance.² The action may be brought by any subsequent owner or occupant of the place, who has been subjected to the nuisance; against all who are concerned in its continuance, whether they be lessees, sub-lessees, or assignees.³ And it does not appear to be necessary, in order to maintain an action for the continuance of a nuisance, that the defendant should have been requested to remove it.⁴ The damage occasioned by a nuisance need not be direct, in order to sustain an action; erecting a dam in a navigable stream, that obstructed plaintiff's raft from passing, has been held sufficient for this purpose.⁵

§ 207. Many acts done upon a man's own property, which are in their nature injurious to the adjoining land, and consequently actionable as private nuisances, may, however, be legalized by prescription. Thus, the right not to receive impure air is an incident of property, and for any interference with this right an action may be maintained; but by an easement acquired by his neighbor,

¹ Baten's case, 9 Co. 54; 2 Rol. Abr. 146, Nuisance, U.

² *Staple v. Spring*, 10 Mass. 72; *Vedder v. Vedder*, 1 Den. 267; *Rex v. Pedly*, 1 Ad. & E. 822; *Bush v. Steinman*, 1 B. & P. 409; *Plumer v. Harper*, 8 N. H. 88. In an action to recover damages for a nuisance caused by the erection of a barn or stable upon the defendant's land, adjoining the plaintiff's dwelling-house, and allowing manure and filthy water to accumulate and stand in the cellar thereof, it is not erroneous for the judge to charge the jury, that, if the defendant constructed and adapted the barn, so that in its ordinary use it would be injurious and offensive to the plaintiff and cast unwholesome odors into his house, the defendant is liable for the nuisance thus caused by his tenants, to whom he had let the barn. But if the use of the barn proves a nuisance, by reason of water in the cellar, and that is a special unusual circumstance, the owner is not liable for the nuisance, unless he knew, or had reason to believe, when he let the barn, that

the use of it, in the ordinary mode, would prove a nuisance. *Pickard v. Collins*, 28 Barb. 444.

³ *Staples v. Spring*, *supra*; *Rogers v. Stewart*, 5 Vt. 215; and see *Brouwer v. Jones*, 28 Barb. 158.

⁴ *Wigford v. Gill*, Cro. El. 269; *Per Denio, J.*, in *Brown v. Cayuga R. R.*, 12 N. Y. 492.

⁵ *Hughes v. Heiser*, 1 Binn. 468. Where a man purchased a lot fronting on a river, for a dwelling-house lot, and covenanted not to use it for any offensive business, nor for a stone-quarry, nor to permit any nuisance to be erected thereon, it was held that leasing the land with the privilege of building a wharf and a railway across the land, for the purpose of drawing stone from a neighboring quarry to the wharf for transportation thence, which wharf also, from its propinquity to a large city, would invite nuisances, was a breach of the covenant, and should be restrained by injunction. *Seymour v. McDonald*, 4 Sandf. Ch. 502.

with twenty years' possession, a man may be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying-on of certain trades. So, with regard to flowing water, though the right to receive the stream in its accustomed course is an easement, yet the right not to have impure water discharged upon a man's land is one of the ordinary rights of property, the infringement of which can only be justified by an easement previously acquired by the party so discharging it. Therefore, an ancient user is held as between individuals to be a justification for the exercise of a noisy¹ or offensive trade,² or for discharging water in an impure state upon the adjoining land.³ But no length of time will legalize a public nuisance;⁴ nor will it affect the question in any way, that the premises injured by a private nuisance were erected after the nuisance was created, for every continuance of it is a fresh nuisance.⁵

§ 208. We may here mention, although it perhaps strictly belongs to that branch of the work which relates to the tenant's remedies, that in case a tenant is aggrieved by a private nuisance, besides resorting to an action at law for damages, or applying to a court of equity for an injunction to prevent its erection,⁶ he may at once

¹ *Elliotson v. Feetham*, 2 Bing. N. C. 184.

² *Bliss v. Hall*, 5 Scott, 500. Per Tindall, C. J., "the plaintiff came to his house with all the rights appurtenant to it, one of which at the common law is a right to wholesome, untainted air; unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbors in favor of the party who uses it, and twenty years' user would alone legalize the nuisance." In this case, the defendant carried on the business of a tallow-chandler on the adjoining premises three years before the plaintiff entered upon his premises, but it was held insufficient to legalize the nuisance.

³ *Wright v. Williams*, 1 M. & W. 77.

⁴ *Stammers v. Dixon*, 7 East, 200. See the application of the common-law principle, *nullum tempus occurrit regi*, to the case of a public nuisance. *Dygert v. Schenck*, 28 Wend. 446. It is said, however, in *Peckham v. Henderson*, 27 Barb. 207, that this rule does not apply to the case of a simple encroachment upon a highway, which does not amount to an ob-

struction, or substantial annoyance to the public.

⁵ *Brady v. Weeks*, 3 Barb. 157; *Howard v. Lee*, 3 Sandf. 281.

⁶ *Catlin v. Valentine*, 9 Paige, 575; 8 Vt. 529; *Lansing v. Smith*, 4 Wend. 9; *Stetson v. Faxon*, 19 Pick. 147. For common-law remedies for nuisance, see *Brown v. Woodworth*, 5 Barb. 550; *Wagoner v. Jermaine*, 3 Den. 806. And as to an injunction to prevent a nuisance, see *Penniman v. N. Y. Balance Co.*, 18 How. Pr. R. 40; *The Mayor, &c. v. Curtis, Clarke*, Ch. 386; *Barrow v. Richards*, *supra*. In general the court will not interfere by injunction to prevent or remove a nuisance, unless it has been erected in violation of a right which a man has long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law. *Van Bergen v. Van Bergen*, 8 Johns. Ch. 282; *Gardner v. Newburgh*, 2 *id.* 164; *Att'y Gen. v. Utica Ins. Co.*, *ib.* 379. If, however, the thing is in itself a nuisance, and the plaintiff's right is not doubtful, the court will interfere to stay irreparable mischief, without waiting for the result of

enter, and abate such nuisance, without the formality of legal process;¹ and trespass will not lie against him, either for the entry or the abatement, provided he commits no riot in doing it.² Thus, where the nuisance complained of was the obstruction of a rivulet, by a dam by means whereof the defendant's cattle could not obtain water so plentifully as before, the defendant was justified in entering upon the plaintiff's soil and abating the dam.³ Lord Ellenborough, delivering the opinion of the court in this case, illustrates the principle by the following cases: "If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch. If he erects upon his own soil any thing which is a nuisance to my house, mill, or land, I may remain on my own soil, or enter upon his, and throw it down, and justify this in an action of trespass. If he stops my way to my common, and encloses the common, I may justify the dejection of the enclosure of the common or way. And this I may still do if I have only an estate for four years." But a man may not turn the water back on the land of the party who increases the natural flow of the stream by means of ditches.⁴

§ 209. In abating a private nuisance, a party is bound to use reasonable care, that no more damage is done than is necessary to effect the purpose; and, so long as he complies with this rule, he will not be answerable for any damage resulting from the act of abating such nuisance.⁵ Therefore, where a man erected a mill-dam, part upon his own land and part upon the land adjoining, and the owner of the adjoining land pulled down the portion of the dam standing upon his land, by which all the dam fell down,

a trial. *Mohawk Br. Co. v. Utica & S. R. R.*, 6 Paige, 554; *Huds. & Del. Canal Co. v. N. Y. & E. R. R.*, 9 *id.* 323. It will not interpose, if the nuisance has been acquiesced in, or encouraged by the party seeking relief. *Harrison v. Newton*, 9 N. Y. Leg. Obs. 847; *Saunders v. Smith*, 3 Myl. & C. 711; *Lewis v. Chapman*, 3 Beav. 133; or, if it merely contravenes the general or public policy. *Smith v. Lockwood*, 13 Barb. 209.

¹ *Gleason v. Gary*, 4 Conn. 418; 2 Mod. 253; *Raikes v. Townsend*, 2 Smith, 9; *Meeker v. Van Rensselaer*, 15 Wend. 397. The act of a plaintiff in abating a private nuisance does not bar him of an action of damages; for the abatement of a nuisance is merely preventive. *Pierce v. Dart*, 7 Cow. 609.

² *Wetmore v. Tracy*, 14 Wend. 250;

Baten's case, 9 Co. 54 b; *Colburn v. Richards*, 13 Mass. 420.

³ *Raikes v. Townsend*, 2 Smith, 9. "If a man builds a house so near to mine that it shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil, and pull it down;" and for this reason only it is said, "a small fine was set upon the defendant in an indictment for a riot, in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights." *Rex v. Rosewell*, 2 Salk. 459; and see *Bellows v. Sackett*, 15 Barb. 98.

⁴ *Williams v. Gale*, 3 Har. & J. 231.

⁵ *Dyer v. Depui*, 5 Whart. 584; *Gates v. Blincoe*, 2 Dana, 168; *James v. Hayward*, W. Jones, 222.

and the water ran out, the court held it justifiable.¹ So if one erects a wall, partly upon his own land and partly upon the land of his neighbor, and the neighbor pulls down the part of the wall upon his own land, and thereupon all the wall falls down, this is lawful.² But he may not abate more than is absolutely necessary, and therefore, where a plaintiff had a right to irrigate his meadow by placing a dam of loose stones across a stream, and *occasionally* a board, and fender, and he fastened the board with two stakes, which he had no right to do, the defendant was held justifiable in removing the stakes, but not in removing the board.³

§ 210. The fact that a private nuisance is indictable as a public nuisance ; or the continuance of a nuisance created by the overflowing of lands by means of a mill-dam for twenty years and upwards, though it confers a right to the use of the land flowed, and constitutes no defence to a proceeding on the part of the public to abate it, — will in neither case prevent an individual from bringing an action against the party causing it, provided he can prove he has himself sustained some special injury thereby.⁴ Nor will the abatement of a nuisance by a plaintiff preclude him from recovering damages sustained by himself prior to the abatement.⁵ *No previous demand* or notice is necessary before making such abatement, except where the tenement on which the nuisance is erected has passed into other hands since its erection ; ⁶ and the demand may then be made either on the lessor or lessee, for the continuance of it is a nuisance by the lessee, against whom an action would also lie.⁷

§ 211. There must be some sensible abridgment of the enjoyment of the tenement to which the easement is attached, in order to amount to a disturbance, although it is not necessary there should be a total obstruction of the easement.⁸ Thus, to maintain an action for obstructing light, it is sufficient to show that the easement cannot be enjoyed in so full and ample a manner as before, or that the premises are, to a sensible degree, less fit for the purposes of business or occupation.⁹ In a case of this kind, the court said,

¹ 2 Rol. Abr. Nusans (S).

² Wigford v. Gill, Cro. El. 269.

³ Greenslade v. Halliday, 6 Bing. 379 ; Williams v. Gale, 3 Har. & J. 231.

⁴ Chichester v. Lethbridge, Willes, 78 ; Crowder v. Tinkler, 19 Ves. 621 ; Mills v. Hall, 9 Wend. 315. And see Penruddock's case, 5 Co. 101.

⁵ Gleason v. Gary, 4 Conn. 418. Pierce v. Dart, *supra*.

⁶ Wigford v. Gill, Cro. El. 269.

⁷ Brent v. Haddon, Cro. Jac. 555 ; Gleason v. Gary, *supra*.

⁸ Moore v. Brown, Dyer, 819, b. pl. 17.

⁹ Cotterell v. Griffiths, 4 Esp. 69.

“The question is whether the plaintiff has the same enjoyment now which he used to have before, of light and air in the occupation of his house; whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of. It is not every possible or speculative exclusion of light which is the ground of an action; but that which the law recognizes is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears the defendant’s premises had been injured by fire, and they re-erected them in a different manner. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they make, must not diminish the enjoyment by the plaintiff of the light and air.”¹

SECTION VI.

OF EASEMENTS.

§ 212. We have seen that a tenant is entitled to the use of all those privileges, easements, and appurtenances in any way belonging to the premises under lease, as incident to his grant, unless they have been expressly reserved, and accepted out of the lease; while he is, at the same time, bound to the performance of all such duties as have been lawfully imposed upon the land for the benefit of others, either individually, or by virtue of any regulation made by the authority of the city or town within whose boundary he has located himself. As these duties and easements essentially affect the tenant’s enjoyment of the premises, it may be proper here to notice the most important of them, with some of their modifications. Under the head of easements may be included all those privileges, which the public, or the occupants of neighboring lands, or tenements, have in the lands of another, and by which the servient owner, upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do something on his own land, for the advantage of the public, or of the person to whom the privilege belongs.² Of these we will here specify ways, commons, fisheries,

¹ *Parker v. Smith*, 5 C. & P. 488; *Back v. Stacey*, 2 C. & P. 465.

² An easement is a privilege without profit, which one neighboring tenement

watercourses, removal of buildings, and the right of support from neighboring soil. There are, besides, a great variety of other servitudes enumerated by Chancellor Kent, in his Commentaries, which grow up in cities, where the population is dense and the buildings are compact,—as the right of support, which arises from contract or prescription, where the owner of a house stipulates to allow his neighbor to rest his timbers on the walls of his house. There is also the servitude of drip, by which one man engages to permit the waters flowing from the roof of his neighbor's house to fall on his estate. So there is the right of drain, or to convey water in pipes through or over the estate of another. These servitudes or easements must be created by the owner alone; and one tenant in common cannot establish them upon the common property without the consent of his co-tenant. They may be limited to certain times; as the drawing of water from a neighbor's well may be confined to certain hours; or a right of passage may be limited to a portion of the day, or to a certain place; and any attempt to exercise such privileges without the owner's consent will subject the party to an action. And a court of equity has jurisdiction in a proper case to regulate, or to restrain by injunction, all violations of these rights.¹

(a.) *Of a Right of Way.*

§ 213. A right of way is the right to use the surface of another person's land for the purpose of passing and repassing; and the incidental right of properly fitting the surface for that use, by levelling, gravelling, ploughing, or paving, while the owner of the soil retains all the rights and benefits of ownership consistent with such easement.² It may arise by a grant of the owner of the

hath of another, existing in respect of their several tenements; by which the servient owner is obliged to suffer, or not to do something on his land, for the advantage of the dominant owner. As to its essential qualities, it is incorporeal, although imposed upon corporeal property; confers no right to a participation in the profits arising from such property; is imposed for the benefit of corporeal property, and must exist between two distinct tenements,—the dominant, to which the right belongs, and the servient, upon which the obligation rests. *Termes de la Ley*; Gale & Wheatley's Law of Easements. As an

incorporeal hereditament, it passes with the dominant tenement by grant or succession; and the servient tenement is transmitted subject to the easement, in like manner. *Wolfe v. Frost*, 4 Sandf. Ch. 72. No one can be said to have an easement in his own land. *Huttemeier v. Albro*, 2 Bosw. 546.

¹ 8 Kent, Com. 436; *Seymour v. McDonald*, *supra*.

² *Perley v. Chandler*, 6 Mass. 454; *Atkins v. Boardman*, 2 Metc. 457. The owner of a right of way has a right to remove all obstructions placed in it. *Williams v. Safford*, 7 Barb. 309. The gran-

soil, by prescription, which supposes a grant, or from necessity. When by grant, it can only be created by deed, although it may be but an easement upon the land of another, and not an interest in the land itself. It concedes only a right of passing in a particular line, and not to vary it at pleasure, or to go in different directions;¹ and, if granted for a particular purpose, it does not include a right of way for another purpose.² If it be a right of way in gross, or a personal right, it is not assignable; and is in that case so exclusive, that the owner of the right cannot take another person with him. But when the right is appendant, or annexed to the estate, it passes with the land to an occupant or assignee.³

§ 214. A right of way may also arise from necessity; as, if a man leases or sells land to another, which is wholly surrounded by his own land, the lessee or purchaser is entitled to a reasonable passage over the lessor's ground to arrive at his land; for this is a necessary incident to the grant, without which the grant would be useless.⁴ It cannot be claimed by one who has a way over his own ground, however inconvenient that may be;⁵ nor if there is a nearer and a better way than the one claimed.⁶ The right of locating it belongs to the owner of the land; but it must be a convenient way.⁷ After it has been once marked out, the grantee has no right to deviate from the course so designated; although the way may become impassable from being overflowed, or otherwise.⁸ There is, however, a temporary right of way over the adjoining lands if the highway be out of repair, or otherwise impassable. But this principle applies only to public and not to private ways; for a person having a private way over another's land has no right to go upon the adjoining land, even though the private way be impassable.⁹

tee of a private right of way, for his own accommodation, must keep it in repair. *Wynkoop v. Burger*, 12 Johns. 222.

¹ *Hewlins v. Shippam*, 5 B. & C. 221; *Jones v. Percival*, 5 Pick. 485.

² *Cowling v. Higginson*, 4 M. & W. 245.

³ *Staple v. Heydon*, 6 Mod. 3; s. c. 2 Id. Ray. 922. Under a lease of an alley, describing it as a lot of land, reserving a right of way to the grantor through the granted lot, it was held that the grantor was not bound to leave the whole alley open, but only enough to give unobstructed the right of way for the purposes reserved. *Jackson v. Allen*, 3 Cow. 220.

⁴ *Doty v. Gorham*, 5 Pick. 487; *Holmes v. Seely*, 19 Wend. 507.

⁵ *McDonald v. Lindall*, 3 Rawle, 492.

⁶ *Jeter v. Mann*, 2 Hill, S. C. 641.

⁷ *Russell v. Jackson*, 2 Pick. 574; *Capers v. Wilson*, 3 McCord, 170.

⁸ *Miller v. Bristol*, 12 Pick. 550; *Wynkoop v. Burger*, *supra*.

⁹ *Miller v. Bristol*, 12 Pick. 552; *Taylor v. Whitehead*, Doug. 745. If a man gives another a license to lay pipes of lead in his land, to convey water to a cistern, he may enter on the land, and dig therein, to mend the pipes. Per *Twisden, J.*, in *Pomfret v. Ricroft*, 1 Saund. 321.

§ 215. The question has been much discussed, whether a right of way, or path for towing vessels, exists along the banks of navigable rivers. Mr. Chancellor Kent observes, that, in those countries where the liberal doctrines of the Roman law have been adopted, lands on each side of a navigable river, as well as on the seashore, have always been regarded as dependencies of the public domain, and subject to the servitude, or burden, of towing-paths, for the benefit of the public; but no such right exists, according to the English law.¹ There has been no adjudication upon this point in New York; but it has been there held, after a thorough examination of the subject, that the public have no right to use and occupy the land of an individual, adjoining navigable waters, as a public landing, or place of deposit of property, in its transit, against the will of the owner; although such user may have been continued upwards of twenty years, with the knowledge of the owner.² Nor is the lessee of a wharf entitled by virtue of his lease, to place structures on the pier, which would materially encumber it, or interfere with its free use, for purposes connected with navigation, by the general public, however advantageous the erection might be to him, or to those interested with him. It is held, however, in Missouri, that navigators and fishermen are entitled to the temporary use of the banks of the navigable rivers in that State, though owned by private individuals, for the purpose of landing and repairing their vessels, and exposing their sails and merchandise; but that such use is only for transient purposes, and under restriction.³

§ 216. A right of way by prescription, for agricultural purposes, is a limited and qualified right, and does not necessarily confer a right to use such way for general or commercial purposes. Thus, a right of way for carriages does not necessarily include a way for cattle.⁴ A reservation, in a lease, of a right of way on foot for

¹ *Ball v. Herbert*, 8 T. R. 258.

² *Pearsall v. Post*, 20 Wend. 111; s. c. 22 *id.* 425; *Comm'rs of Pilots v. Clark*, 33 N. Y. 251. This case also holds that the lease of a wharf from the public authorities of a city does not confer on the lessee an exclusive right to the possession, use, or control of the wharf. So far as it is used by his own vessels, he pays no wharfage; and so far as it is made use of by other persons, he, as the grantee of the city, succeeds to the rights

of that corporation in respect to wharfage. It is, notwithstanding, a public wharf, and vessels resorting to it, whether they are those of the lessee or of other persons, are subject to the general rules of law regulating the use of wharves, piers, and slips, and the mooring and stationing of vessels.

³ *O'Fallon v. Daggett*, 4 Mo. 343.

⁴ *Jackson v. Stacy*, Holt, N. P. C. 455; *Ballard v. Dyson*, 1 Taunt. 279; *Kirkham v. Sharp*, 1 Whart. 323.

horses and cattle, does not give a right to carry manure;¹ for a right of way to a close for some purposes must not be enlarged for other purposes.² But the extent of this right is a question for a jury under the circumstances of each particular case.³ As a general rule, where there is a license to use a certain way, there must be a reasonable use of it; as, if a man let a house, reserving a right of way to the rear, he cannot go through without request, nor at unseasonable hours.⁴ Twenty years' uninterrupted user is sufficient to presume a grant of a right of way, provided it is held adversely, and not by permission.⁵ But the erection of a gate at the time a way is opened, or the declarations of the owner at such time, contradictory of the right, will rebut the presumption of the grant of a common way.⁶ The extent of the right is limited by the ordinary mode of user, unless a grant be shown, in which case it will be confined to the terms of the instrument not having been averse thereto.⁷

§ 217. From long forbearance to exercise a right of way, a release may be presumed; but when the right can only be acquired by twenty years' enjoyment, it cannot be lost by disuse for a shorter period.⁸ Unity of possession of the close where a private way exists, with the close to which such a way is appurtenant, or which gives the right of way, may cause an extinction of the same; as, if a man have a way over the close of another, and he purchase that close, the way is extinguished by the unity of possession.⁹ But this is to be understood of a mere way of easement; for if it be a way of necessity, it will not be extinguished by such unity of possession; nor unless the necessity ceases.¹⁰ And if it be a prescriptive easement, mere unity of possession but suspends the right; it requires a unity of ownership to destroy it.¹¹ Therefore, where a party seised in fee of certain premises took a lease of the adjoining land, the owner of which had previously enjoyed an easement in the former, such unity of possession was held

¹ *Brunton v. Hall*, 1 Gale & D. 207.

² *Comstock v. Van Deusen*, 5 Pick. 163; *Webster v. Bach*, 1 Freem. 247.

³ *Cowling v. Higginson*, 4 M. & W. 245.

⁴ *Tomlin v. Fuller*, 1 Vent. 48.

⁵ *Maverick v. Austin*, 1 Bail. 59; *Gayetty v. Bethune*, 14 Mass. 58; *Turnbull v. Rivers*, 3 McCord, 131.

⁶ *Commonwealth v. Newbury*, 2 Pick. 51; *Barker v. Clark*, 4 N. H. 384.

⁷ *Hart v. Chalker*, 5 Conn. 316; *Atkins v. Boardman*, 20 Pick. 291.

⁸ *Wright v. Freeman*, 5 Har. & J. 476; *Emerson v. Wiley*, 10 Pick. 316; *White v. Crawford*, 10 Mass. 189. See also *Miller v. Garlock*, 8 Barb. 153.

⁹ *Dyer*, 295; *Sury v. Pigott*, Palm. 446; s. c. 3 Bulst. 340.

¹⁰ *Grant v. Chase*, 17 Mass. 448; *McDonald v. Lindall*, 3 Rawle, 496.

¹¹ *Manning v. Smith*, 6 Conn. 289; *Canham v. Fisk*, 2 Tyrw. 155.

to suspend, and not to extinguish, the right of way over the former.¹

(b.) *Of Commons.*

§ 218. The term commons is used to denote that right or privilege which one or more persons have, to take or use some portion of that which another person's lands, woods, or waters produce, in order to provide pasture for his cattle, fuel for his family, or means of repairing his houses, fences, and implements of husbandry. It was originally designed to encourage agriculture, and commenced in some agreement between lords of manors and their tenants; but, being continued by usage, it becomes valid without an instrument in writing to prove the original grant. The most general and valuable kind of common is that of pasture, or the right of feeding one's beasts on another's lands. The policy of the old law, however, in favor of common of pasture and of estovers, as being conducive to improvement in agriculture, has entirely changed or become obsolete, and the right itself is scarcely recognized in this country. It probably does not exist in any of the Northern or Western States of the Union,² except in the State of New York, where it has been the subject of some litigation; resulting, substantially, in the adoption of the principle of English law, that where the right of common of pasture has once been established, the right of the owner of the soil to improve his waste lands must be exercised consistently with the preservation of the right of common.³

§ 219. Common of pasture is either *appendant* or *appurtenant*. The first is founded on prescription, and is regularly annexed to arable land. It authorizes the tenant to put commonable beasts upon the waste grounds of the manor, but such beasts must be *levant* and *couchant* on the estate; that is, such cattle only as are necessary to plough and manure the land, and so many as the land will sustain during the winter. Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well

¹ Thomas v. Thomas, 2 Cr. M. & R. 84.

² Trustees, &c., v. Robinson, 12 S. & R. 88.

³ Watts v. Coffin, 11 Johns. 495. A custom that all the inhabitants of a particular town, for the time being, have the right to depasture the unenclosed woodlands of individual proprietors within the town, is not a mere easement, like a right

of way, or a right to flow water: it is a right to take a profit; and for such a right, the commoner must prescribe in respect to some estate, and not in respect to mere inhabitancy. The custom is therefore void. Smith v. Floyd, 18 Barb. 522; Pearsall v. Post, 20 Wend. 111; s. c. 22 id. 425; Grimstead v. Marlowe, 4 T. R. 717; Gateward's case, 6 Co. 59, b.

as by prescription. It allows the occupant to put in other beasts than such as plough or manure the land; and, not being founded on necessity, like the other right as to commonable beasts, was never favored in law.¹ Common of pasture, whether appendant or appurtenant, may be apportioned; for, as the land is entitled to common only for such cattle as are necessary to plough and manure it, the common cannot be surcharged by any number of divisions or subdivisions in consequence of alienation. Such common, therefore, being incident to the land, passes with it in such proportions as the land may be divided into.² But common of estovers is not apportionable: for if this were to be allowed the land might be surcharged; as if, for instance, estovers are granted to a farm of two hundred acres, so long as this is one farm there is but one house, and, perhaps, not more than two chimneys; but, if the farm is divided, and another house becomes necessary, double the number of chimneys must be supplied, which would be injurious to the inheritance if it were to be allowed. So, also, of fences and buildings; upon a division of the farm, more fences and buildings become necessary, and if both are to be supplied from the woods of the proprietor, an increased quantity would be taken, when by the grant itself only estovers for one farm were intended.

§ 220. Since estovers cannot be apportioned, neither of the tenants, in case of a division of the farm, can have them; they therefore become extinguished, whenever a division is made by the act of the party among several tenants. They belong to the whole farm as an entirety, and not to parts of it; and as the owner of no one portion can enjoy the right, it is necessarily extinguished, and can only be revived by a new grant.³ And if common of estovers devolves upon several by operation of law, as by descent, they cannot (at least under the operation of the statute of descents in New York) enjoy the right in severalty; although they may unite in a conveyance, and vest the right in one individual. It is a joint right, to be enjoyed jointly by the heirs or their assigns; on the principle, that the land charged with the right ought not to have an increase of burdens by the multiplication of claimants.⁴

¹ *Van Rensselaer v. Radcliff*, 10 Wend. 639.

² *Livingston v. Tenbroeck*, 16 Johns. 26; *Bennet v. Reeve*, Willes, 227.

³ *Van Rensselaer v. Radcliff*, 10 Wend. 649.

⁴ *Leyman v. Abeel*, 16 Johns. 80. A tenant entitled to estovers in the unappropriated lands of a manor, may, if the landlord seeks to deprive him of his right by leases of the adjoining common lands, resort to more distant parts, though they

If a stranger, who has no right, puts his cattle upon the common, the landlord may distrain them damage-feasant, or may have his remedy by action of trespass: and the commoner may, in like manner, distrain, or sue for damage by an action on the case.¹ If a commoner surcharge the common, the landlord may distrain the extra beasts, or bring trespass, while the other commoners may have an action on the case.²

(c.) *Of Fisheries.*

§ 221. A common of fishery, according to Mr. Chancellor Kent, is of two kinds: the one, a right of fishing common to all; and the other, a right vested exclusively in one or a few individuals. By the common law, owners of lands on the banks of fresh-water rivers, above the ebbing and flowing of the tide, have the exclusive right of fishing, as well as the right of property opposite to their respective lands *ad filum medium aquæ*. And where the lands on each side of the river belong to the same person, he has the same exclusive right of fishery in the whole river, so far as his lands extend along the same. But such right is always subject to the public convenience; and all erections or impediments made by the owners, so as to obstruct the free use of the river, as a highway for boats or rafts, are deemed nuisances.³ So far as regards the right of fishery in rivers that are not navigable (and in the common-law sense of the term, those only are deemed navigable in which the tide ebbs and flows), it is subject to the further qualification of not being so used as to injure the private rights of others; and

are more valuable. *Van Rensselaer v. Brice*, 4 Paige, 174. Firebote cannot be claimed for an under-tenant. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

¹ *Cheesman v. Hardham*, 1 B. & A. 706; *Ricketts v. Salwey*, 2 *id.* 860.

² *Bowen v. Jenkins*, 6 Ad. & E. 911. In *West Roxbury v. Stoddard*, 7 Allen, 158, an action was brought against persons who cut ice from Jamaica Pond, the fee of the land under said pond being vested in said town, for public uses. The court held that fishing, fowling, boating, bathing, skating, or riding upon the ice, taking water for domestic or agricultural purposes, or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds to all persons who own land adjoining them, or can obtain

access without trespass, so far as they do not interfere with the reasonable use of the pond by others, where the legislature has otherwise directed. That the town of West Roxbury had no such property in the ice on Jamaica Pond as would enable it to maintain this action, even if the fee of the pond be considered to be in the town; and that the remedy for any unreasonable or excessive use of the liberty of cutting ice, being the violation of a public right, is by indictment; and the towns may regulate the use of the ponds by reasonable by-laws, adopted and approved according to statute. If these are insufficient, resort must be had to the legislature. That ice may be property, see *Ward v. The People*, 6 Hill, 144.

³ *Hooker v. Cummings*, 20 Johns. 90.

it does not extend to impede the passage of fish up the river, by means of dams or other obstructions.¹

§ 222. The private right of fishery is confined to fresh-water rivers, above tide-water, unless a special grant or prescription is shown; but the right of fishing in the sea, or in a bay or arm of the sea, and also in navigable or tide waters, is a right public and common to every one; and no individual can appropriate to himself an exclusive privilege in navigable waters or an arm of the sea, without showing a grant or prescription for the same.² But no person has at common law a right of going over another man's land for the purpose of fishing, or of crossing the grounds of an individual lying upon the beach or sea-shore, on foot, or otherwise, in order to bathe in the sea, as against the owner of the soil of the shore.³ The legislatures of the several States have also assumed the regulation of the passage and protection of fish, in streams not navigable in the technical sense. And it is now considered that fisheries are, as at common law, the exclusive right of the owners of the banks of rivers not navigable, unless otherwise appropriated by statute; and that the right, unless secured by a particular grant or prescription, is held subject to legislative control.⁴ But by force of a grant; or by prescription, a person may have an exclusive right of fishery, even in an arm of the sea, or in a navigable river, where the tide ebbs and flows. Thus, a patent to the inhabitants of a town, conveying all lands under water within the bounds of the grant, together with the exclusive right of fishing in the waters of the same, confers this right as the common property of the town, and may be regulated by rules adopted at the town meeting.⁵

¹ *The People v. Platt*, 17 Johns. 195; *The People v. Tibbets*, 19 N. Y. 523; *Hooker v. Cummings*, *supra*; *Ex parte Jennings*, 6 Cow. 518; *Berry v. Carle*, 3 Greenl. 269; *Scott v. Willson*, 8 N. H. 321; *Commonwealth v. Charleston*, 1 Pick. 180; *Adams v. Pease*, 2 Conn. 481; *Browne v. Kennedy*, 5 Har. & J. 195; *Comr's v. Kempshall*, 26 Wend. 404.

² *Arnold v. Mundy*, 1 Halst. 1; *Martin v. Waddell*, 16 Pet. 400; *Parker v. Cutler Man. Co.*, 20 Me. 358; *Carter v. Murcot*, 4 Burr. 2182; *The Mayor v. Richardson*, 4 T. R. 437. A riparian proprietor on the bank of the Hudson River has no better right to the use of the soil between high and low water mark than any other person. *Gould v. Huds. Riv. R. R.*, 6 N. Y. 522.

³ *Blundell v. Catterall*, 5 B. & A. 268. A right of fishing in any water gives no power over the land. *Cortelyou v. Van Brundt*, 2 Johns. 357.

⁴ *Nickerson v. Brackett*, 10 Mass. 212; *Waters v. Lilley*, 4 Pick. 145; *Vinton v. Welsh*, 9 id. 87; *Cottrill v. Myrick*, 3 Fairf. 222; *Lunt v. Hunter*, 16 Me. 1; *Stoughton v. Baker*, 4 Mass. 527.

⁵ *Rogers v. Jones*, 1 Wend. 237. In our busy trading age, the contemplative man's recreation as "honest" Isaac Walton calls fishing, seems to be very much neglected; for, as Mr. Chancellor Kent observes, in the Commentary to which our text is largely indebted, manufacturing, machinery, and steamboats, together with the skill and cupidity and perseverance of fishermen, have much diminished

§ 223. Although the right of fishing in a navigable river is a common right, the adjoining proprietors have the exclusive right of drawing a seine and taking fish on their own land; and if an island, or a rock in tide-waters, be private property, no person but the owner has the right to use it for the purpose of fishing.¹ It may be observed, also, that in Pennsylvania the doctrine which holds no rivers to be navigable, so as to confer the common right of fishery, except those where the tide ebbs and flows, is not applicable to the great rivers of that State; and that the owners of land on the banks of such rivers as the Delaware and Susquehanna, so far as they are common highways, have no exclusive right of fishing opposite their respective lands. The right to such fisheries is declared to be vested in the State, and open to all the world.² A similar exception to the common-law rule has been suggested to exist in North and South Carolina, and probably in other States.³ The property which the law gives in river-fish uncaught is of that kind which is called special or qualified property, and is derived out of the right to the place or soil where such fish live; a man has a special property in them so long as they are upon his land, or in the water which flows over it; but he loses such property the moment they resort to the soil or water of another. However, if an individual plants a bed of oysters, even in a bay or an arm of the sea, and marks it out by stakes, it is held to be no interference with the common right of fishing in such bay, and he acquires a qualified property in such oysters, sufficient to enable him to maintain trespass against any person who invades such property.⁴

(d.) *Watercourses.*

§ 224. Every proprietor of land through which a natural stream of water flows, has a right to the advantages of that stream, flowing in its natural course, and to use it, when he pleases, for any purposes not inconsistent with a similar right in the proprietor of the land above and below. And he is entitled to have the whole of it pass through his land, though he may not require the whole or any part of it for the use of machinery.⁵ But if, after hav-

the resort of the most valuable fish into the rivers of the Northern States. But the learned Chancellor does not doubt that society has gained by the change.

¹ *Lay v. King*, 5 Day, 72; *Commonwealth v. Shaw*, 14 S. & R. 9.

² *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71.

³ *Ex'ors, &c., v. Waddington*, 1 McCord, 580; *Collins v. Benbury*, 3 Ired. 277.

⁴ *Fleet v. Hegeman*, 14 Wend. 42.

⁵ *Crooker v. Bragg*, 10 Wend. 280;

ing applied it to some purpose of utility, he is interrupted in doing so by a diversion, he has no right of action against the party diverting the water, unless his exclusive occupation had existed a sufficient length of time to raise a presumption of a grant to use the water, to the detriment of others who are equally entitled to the enjoyment of it with himself.¹ He cannot, without the consent of the adjoining proprietors, divert or diminish the quantity of water, which would otherwise descend to the proprietor below, nor throw back the water upon the proprietor above, without a grant, or an uninterrupted enjoyment of twenty years, which is equivalent to a grant.² Where a spring of water rises upon the land of one person, and from it flows a stream to the land of another, the owner of the land where the spring rises has no right to divert the stream from its natural channel; although the waters of the stream are not more than sufficient for his domestic uses, his cattle, and the irrigation of his land.³ Nor can a party erect a dam above the mill of another, by which the water is diverted from its accustomed channel, so as to affect the regularity of the supply, though there is no waste of water, and it be returned to its ordinary channel long before it reached the other's mill.⁴ Neither will he be permitted to corrupt a stream of water, to the prejudice of his neighbor.⁵

§ 225. But supposing a person to have acquired a certain exclu-

Bealey v. Shaw, 6 East, 208. Where hydraulic privileges are created by conducting a stream across lands in an artificial channel, the proprietors of lots crossed by it, in the absence of any stipulation to the contrary, have the same rights to the use of the water on their respective lots as between themselves, as would exist if the artificial were the natural channel of the stream. *Townsend v. McDonald*, 12 N. Y. 381.

¹ *Mason v. Hill*, 5 B. & Ad. 23; *Frankum v. Falmouth*, 6 C. & P. 529; *Hatch v. Dwight*, 17 Mass. 289; *Strickler v. Todd*, 10 S. & R. 63; *Hazard v. Robinson*, 3 Mason, 272. And see *Platt v. Johnson*, 15 Johns. 213; *Merritt v. Brinkerhoff*, 17 *id.* 306.

² *Belknap v. Trimble*, 3 Paige, 577; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Belknap v. Belknap*, *ib.* 463; *Merritt v. Parker*, 1 Coxe, 460; *Wright v. Howard*, 1 Sim. & S. 190; *Bealey v. Shaw*, *supra*; *Magor v. Chadwick*, 11 Ad. & E. 571. Even for the purpose of repairing his own mill. *Van Hoesen v. Coventry*, 10 Barb. 518. Nor can he justify a diversion on

the ground that if the other party would make a better dam, there would still be left enough water to supply his mill. *Crooker v. Bragg*, *supra*.

³ *Arnold v. Foot*, 12 Wend. 330; *Van Hoesen v. Coventry*, 10 Barb. 518. And after having changed the natural flow of the water, and continued such change for twenty years, he will not be permitted to restore it to its natural state, to the prejudice of mills which have been erected with reference to such change. *Belknap v. Trimble*, *supra*.

⁴ *Sackrider v. Beers*, 10 Johns. 241; *Shears v. Wood*, 7 Moore, 345; *Mason v. Hill*, 5 B. & Ad. 1; *Wright v. Howard*, *supra*; *Hammond v. Fuller*, 1 Paige, 197.

⁵ *Howell v. McCoy*, 3 Rawle, 269; *Thomas v. Brackney*, 17 Barb. 654. The grant of an undivided share of a stream does not authorize its use to the injury of others jointly interested in it. The property in a stream of water is indivisible; and it must be used as an entire stream in its natural channel. *Vandenberg v. Van Bergen*, 13 Johns. 212.

sive right to the enjoyment of water, he will not be permitted to make use of that right in an unreasonable manner, so as sensibly to affect the application of it by his neighbors below on the stream; as by shutting the gates of his dams, and detaining the water unreasonably, or by letting it off in unusual quantities, to the annoyance of his neighbor.¹ So where two or more mills are entitled to a common use of water, the owner of the upper mill must afford the lower one a fair and reasonable participation in its use.² But no action can be sustained by one riparian proprietor against another for erecting a dam on the stream, whereby the water is raised along the plaintiff's land above its natural level, without proof of special damage.³

§ 226. If a man neglects to keep his dam in proper repair, and, in consequence of such negligence, his neighbor's dam and mill below are injured, he will be responsible for the damage. But if the dam has been built upon a proper model, and the work well and substantially done, he will not be liable though it break away by force of the water, and the lower dam and mill be destroyed.⁴ Where a dam is erected upon an ancient stream, to obtain a head of water for the use of one of the State canals, the surplus waters of the stream not wanted for public use, and which continue to flow over the dam and down the ancient channel, belong to the owners of water-rights upon the margin of the stream below, in the same manner as if the State dam had not been erected; and a lessee of the surplus waters of the canal cannot divert them to the injury of the proprietors of mill-privileges on the stream below. No person, however, except by the authority of the legislature, or of the authorized agents of the State, has a right to tap the State dam and draw off the surplus waters of the artificial pond, which is created by such dam for public purposes.⁵

§ 227. The right to the enjoyment of this or any other easement may be controlled by a grant, or by prescription, which supposes a grant, for though the stream be diminished in quantity, or injured by the exercise of certain trades, yet if the party so using it has enjoyed his occupation for twenty years, he has acquired a pre-

¹ *Van Bergen v. Van Bergen*, 8 Johns. Ch. 282; *Beissell v. Sholl*, 4 Dal. 211; *Colburn v. Richards*, 18 Mass. 420; *Runnels v. Bullen*, 2 N. H. 582.

² *Merritt v. Brinkerhoff*, 17 Johns. 306. Mere inconvenience in his business is not a cause of action, if the interception of the

water does not extend to the destruction or diminution of the uses of the plaintiff's mill. *Palmer v. Mulligan*, 8 Caines, 807.

³ *Garrett v. McKie*, 1 Rich. 444.

⁴ *Livingston v. Adams*, 8 Cow. 175.

⁵ *Varick v. Smith*, 6 Paige, 187.

scriptive right to such use, and the party below must take the stream subject to such adverse right; it having been repeatedly held that the exclusive enjoyment of water in a particular way for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title, as against a right in any other person, which might have been but was not asserted.¹

§ 228. Neither is it necessary that the person claiming such right should have used it in precisely the same manner during that time, or that it should have been used to propel the same machinery; all that the law requires is, that the mode or manner of using the water should not have been materially varied to the prejudice of others. Therefore, if a proprietor at the head of a stream has changed the natural flow of the water, and continued such change for more than twenty years, he cannot afterwards be permitted to restore it to its natural state, when it will have the effect of destroying the mills of other proprietors below, which have been erected in reference to such change in the natural flow of the stream.² But if a man has had the use of water at a given height for twenty years, a grant will be presumed of the privilege of using it at that height, and nothing more; and if he repairs his dam, which has kept the water at that height, so as to raise the water still higher, and flow it back upon his neighbor's mill, he is liable to an action, though the dam itself remain at its ancient height; for the question is not as to the height of the dam, but of the water.³

§ 229. A grant of land, bounded upon a river or stream where the tide does not ebb and flow, carries the right of the grantee to the middle of the stream, unless the language of the grant is clearly such as to show the intent of the parties to be that it should not extend beyond the water's edge. If the stream is navigable for either boats or rafts, the public have a right to use it for those purposes, and the rights of the adjoining proprietors are

¹ *Campbell v. Smith*, 3 Halst. 189; *Cooper v. Smith*, 9 S. & R. 26; *Sherwood v. Burr*, 4 Day, 244; *Brown v. Best*, 1 Wils. 174; *Barker v. Richardson*, 4 B. & A. 579; *Cross v. Lewis*, 2 B. & C. 686; *Livett v. Wilson*, 8 Bing. 115. And the right does not relate to the purpose for which the water is to be used, but to the manner and extent of the diversion. *Smith v. Adams*, 6 Paige, 435; *Belknap v. Trimble*, *supra*.

² 8 Kent, Com. 442; *Belknap v. Trim-*

ble, supra; *Blanchard v. Baker*, 8 Greenl. 253; *Hazard v. Robinson*, 3 Mason, 272.

³ *Stiles v. Hooker*, 7 Cow. 266. The mere omission by one proprietor to make use of a right which belongs to him, however long continued, will not prejudice him, or confer any right upon the adjoining proprietors. *Townsend v. McDonald*, 12 N. Y. 381; *Crooker v. Bragg*, 10 Wend. 280; *Bealey v. Shaw*, 6 East, 208.

subject to the public easement.¹ They may use the water, or the land under the water, in any manner which does not impair its use as a public highway; but they cannot erect dams, or place other obstructions in the stream, which will interfere with its free and convenient use for public purposes. Nor can the State divert the water of the stream, or interfere with it in any other manner that will render it less useful to the proprietors of the adjacent shores, without making full compensation.² A prescriptive right to a public towing-path on the bank of a navigable river is not destroyed in consequence of an act of the legislature, converting that part of the river adjoining a towing-path, into a floating harbor; and if either the water, or the improvement, impair the facility of passing along the bank, the public have a reasonable way over the nearest part of the next field.³

§ 230. A novel and rather curious question has been recently mooted in England, which deserves to be noticed here, as to whether the right to the enjoyment of an underground spring, or of a well supplied by such spring, was governed by the same rule of law as that which regulates watercourses flowing on the surface. It was an action on the case for damage sustained by the loss of the water from the well, in the plaintiff's close, occasioned by the defendant's digging a coal-pit about three-quarters of a mile off. The well had been constructed for twenty years, and was used for working a cotton mill. Chief Justice Tindal, after stating that the rule which governs streams running in their natural courses either assumes for its foundation the implied assent and agreement of the proprietors of the different lands, or may be considered as a rule of positive law, concludes there could be no ground for inferring any mutual consent or agreement for ages past between the owners of the several lands beneath which un-

¹ *Adams v. Pease*, 6 Conn. 481; *Claremont v. Carlton*, 2 N. H. 869; *King v. King*, 7 Mass. 496; *Hay's Ex'rs v. Bowman*, 1 Rand. 417; *Berry v. Carle*, 8 Greenl. 269; *Morrison v. Keen*, *ib.* 474; *Ingraham v. Wilkinson*, 4 Pick. 268; *Arnold v. Mundy*, 1 Halst. 1; *Gavit v. Chambers*, 8 Ohio, 496; *Brown v. Kennedy*, 5 Har. & J. 196; *People v. Seymour*, 6 Cow. 579; *Hooker v. Cummings*, 20 Johns. 90. Rivers of sufficient capacity to float to market the products of the country are public highways. 8 Kent. Com. 411; *Browne v. Scofield*, 8 Barb. 239. A river is deemed navigable, as far as the tide rises and falls,

though the water be fresh. *People v. Tibbetts*, 19 N. Y. 523.

² *The People v. The Canal Appraisers*, 18 Wend. 855; *Ex parte Jennings*, 6 Cow. 548.

³ *Ball v. Herbert*, 3 T. R. 258; *Rex v. Tippet*, 3 B. & A. 193. Persons navigating public waters may use docks erected upon them, without any express permission of the owner; and therefore the owner of a dock cannot terminate the occupancy by setting the vessel adrift so as to endanger its safety, until after request to remove, and neglect to do so in reasonable time. *Heeney v. Heeney*, 2 Den. 625.

derground springs exist, and, consequently, no trace of positive law could be inferred from long-continued acquiescence; and that, therefore, the case did not fall within the rule which obtains as to surface streams, but rather within that principle which gives to the owner of the soil all that lies beneath its surface; the damage occasioned to another by the exercise of such a right being considered *absque injuria*.¹

(e.) *Removal of Adjoining Building.*

§ 231. If a man, whether landlord or tenant, finds it necessary to pull down a house, and gives due notice of his intention, as well as of the time of doing so, to the owner of the adjoining building, he is not answerable for any injury the owner of such house may sustain by the operation, provided he removes his own with reasonable and ordinary care.² But the owner of the premises adjoining those pulled down must also shore up his own building, and do every thing proper to be done upon it for its preservation; and if he neglects to take such precaution, he is without remedy for any injury it may sustain, unless it clearly appear that the pulling-down by the other was done in so wasteful, negligent, or improvident a manner, as to occasion greater risk than, in the ordinary course of doing the work, ought to have been incurred.³

§ 232. Whether due caution has been used, is, in every case, a

¹ *Acton v. Blundell*, 12 M. & W. 824. The principle of this case is cited with approbation by Chief Justice Bronson, in giving the opinion of the court in *Radcliff's Ex'rs v. The Mayor*, 4 N. Y. 200. The Supreme Court of New York has since decided, that the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor. That the rule, that a man has a right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequently injure his perceptible and clearly defined rights, is applicable to the interruption of the sub-surface supplies of a stream, by the owner of the soil; and the damage resulting from such an inter-

ruption is not the subject of legal redress. *Ellis v. Duncan*, 21 Barb. 280.

² *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92; *Peyton v. The Mayor*, 9 B. & C. 725; *Massey v. Goyder*, 4 C. & P. 161. The provision of the laws of New York of 1855, that when a person excavating, &c., on his lot, in the city of New York, is given a license by the adjoining owners to enter on their land to protect their buildings from injury by the excavation, he must so protect them, — does not impose any duty upon a landlord, as towards his tenant, to secure protection for the tenement by giving such license. *Sherwood v. Seaman*, 2 Bosw. 127. See *Laws of New York of 1855*, 11, c. 6, as to how party and other walls in New York and Brooklyn are to be supported during excavations.

³ *Walters v. Pfeil*, Mood. & M. 864; *Per Ld. Tenterden*, *Massey v. Goyder*, *supra*; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Trower v. Chadwick*, 3 Bing. N. C. 884; *Dodd v. Holme*, 1 Ad. & E. 498.

question of fact for a jury, depending upon its own peculiar circumstances. Thus, in a recent case, the action was brought for digging the foundation of an intended building, on a piece of land next adjoining the house of the plaintiff, so carelessly that the walls and foundations of the plaintiff's house gave way and sunk. On the trial it appeared, that the defendants excavated their own ground about six feet deep, and came within about four feet from the plaintiff's house. After the excavation, the plaintiff's gable wall bulged, and the defendants made an ineffectual attempt to shore it up; but it gave way in all directions, and it became necessary to rebuild. The case was held to turn upon the question, whether the fall of the wall was occasioned by the defendants' negligence, or by its own infirmity; and that, in inquiring whether the injury was owing to the neglect of the defendants, the state of the premises must be taken into consideration by the jury; that if the wall was so infirm as to be unable to sustain itself six months longer, still the defendant had no right to accelerate its fall, and that such a state of the wall would render more care necessary on the part of the defendant not to hasten its dissolution.¹ So, in an action on the case, for negligently and carelessly excavating the defendant's own land, and thereby withdrawing the support from the plaintiff's house, which the declaration alleged it was entitled to, it appeared that, for about twenty-six years, the plaintiff had rested his house upon a wall belonging to the defendant, by permission originally from the defendant; and that, by excavating too near his wall, the defendant had caused it to sink, and thereby injured the plaintiff's house, which rested against it; upon a special verdict of the jury, that the excavation was made in a careless and unskilful manner, the court sustained the action.²

(f.) *Right to Support from Neighboring Soil and Buildings.*

§ 233. Neither is the proprietor of land at liberty to dig and mine at pleasure on his own soil, without considering what effect

¹ *Dodd v. Holme*, *supra*; *Pierce v. Musson*, 17 La. 889; *Trower v. Chadwick*, *supra*; *Massey v. Goyder*, *supra*.

² *Brown v. Windsor*, 1 Cr. & J. 20. Where the defendant permitted another person to remove earth from a hill on defendant's land, and it was so negligently done that earth slid from the hill upon plaintiff's land, the defendant was held liable for the injury, upon the general

principle that he was bound to control the use of his own premises so as not to produce injury to others. *The Mayor v. Bailey*, 2 Den. 445; *Bush v. Steinman*, 1 B. & P. 404. It is to be intended that the owner has control over those who work upon his premises; and he cannot discharge himself from that intentment of law by any act or contract of his own. *Gardner v. Heartt*, 1 Den. 466.

such excavations must produce upon the land of his neighbor; since the withdrawal of the lateral support would, in many cases, cause the falling-in of the adjoining land; and this right of support is an easement necessarily attached to the soil, and its violation will be restrained by injunction.¹ A man may excavate a canal, but he cannot cart the dirt, or throw the stones, upon the land of his neighbor, either by human agency, or by the force of gunpowder.² He may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own.³ He may excavate and move his own soil, for any lawful purpose, but if he thereby removes the natural support of his neighbor's land, so that it cannot stand by its own coherence, and it subsides and falls into the pit made by his excavations, thus disturbing his neighbor in the enjoyment and possession of his property, and damaging him, the law will hold the wrong-doer responsible for such consequences, provided his neighbor has done nothing, with his own land, contributing to produce the injury, and in hostility to the legitimate and proper exercise of the other's paramount right to improve his own premises.⁴ But if any thing has been done to increase the lateral pressure,—as where buildings have been erected,—it is settled, that no man has a right to the increased support necessary to sustain such building, unless it is of ancient erection.⁵ If a house has stood twenty years without adverse claims, it has acquired the rights of an ancient house, by prescription; and, though without negligence on the part of the

¹ *Farrand v. Marshall*, 21 Barb. 409; s. c. 19 *id.* 380.

² *Hay v. The Cohoes Company*, 2 N. Y. 159. And, in such cases, the tenant of the premises may have an action for the injury to his possession, as well as the reversioner for the injury to his reversion. *Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hardrop v. Gallagher*, *ib.* 523; *Austin v. Huds. Riv. R. R.*, 25 N. Y. 334.

³ 2 *Rol. Abr. Trespass*, I. pl. 1. In estimating the damages sustained by a tenant for years, whose possession has been injured by a wrongful excavation on the adjoining premises, the jury will take into account the expense necessary to restore the building to such a state as would make the possession as beneficial to the tenant as it was before the trespass was committed; but the allowance must not exceed the value of the plaintiff's term, taking

into view the rent reserved. *Walter v. Post*, 6 Duer, 363; and see *Gourdier v. Cormack*, 2 E. D. Smith, 200.

⁴ A court of equity has power to restrain a land-owner from excavating or removing soil from his land, adjoining the land of another, if the effect of such excavation and removal will be, to cause the land of his neighbor, by reason of the withdrawal of its natural support, to fall away or subside. Per *Wright, J.*, in *Farrand v. Marshall*, *supra*.

⁵ *Lord Tenterden*, in *Wyatt v. Harrison*, 3 B. & Ad. 875. In the city of New York, the foundation of every building must be not less than ten feet below the street, or sidewalk directly in front of it; and if not, the owner will not be entitled to recover damages, by the erection, with ordinary care, of an adjoining building. *Laws of New York*, 10 April, 1818.

excavator, cannot be lawfully disturbed by deep excavations, or other improvements on adjoining lots. But, otherwise, a person may make reasonable improvements and excavations on his own ground, though they should injure or endanger an edifice on the adjoining land, by digging near and deeper than its foundations; provided he exercises ordinary care and skill, and the injured party does not possess any special privileges protecting him from the consequences of such improvements, either by prescription or by grant.¹ In a case where a man had built to the extremity of his soil, and enjoyed his building above twenty years, Lord Ellenborough held, upon analogy to the rule as to light and air, that he had acquired a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support, but that it was otherwise of a house newly built.²

§ 234. But a house will not have the privilege of support as an ancient erection, if it appears to have been built upon ground previously excavated. In a recent case, the plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years, upon his own land, and considerably within his own boundary; the defendants excavated so near their boundary as to cause damage to the plaintiff's buildings, one of which stood upon ground which had been previously excavated. The court held, that if a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support, or otherwise, upon the land of his neighbor; he has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect; that if the land, on which the plaintiff's house was built, had not been previously excavated, the defendants might, without injury to the plaintiff, have excavated to the extremity of their land. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He had, therefore,

¹ *Lasala v. Holbrook*, 4 Paige, 169; *Richart v. Scott*, 7 Watts, 460; *Thurston v. Hancock*, 12 Mass. 220; *Story v. Oden*, *ib.* 157.

² *Callendar v. Marsh*, 1 Pick. 484; *Stansell v. Tollard*, 1 Selw. N. P. 444; *Wyatt v. Harrison*, 3 B. & Ad. 871. Where one of two buildings having a party wall common to both becomes so dilapidated as to be unsafe and unfit for occupation, and the owner, after giving reasonable notice

of his intention to the tenant of the adjoining building, proceeds to take down the whole wall for the purpose of rebuilding it, he is not responsible to the tenant of the adjoining building for any damages resulting from its exposure to weather or other causes, if he consumes no unnecessary time in completing the work, and uses proper care and skill in its execution. *Partridge v. Gilbert*, 15 N. Y. 601.

by building on ground insufficiently supported, caused the injury to himself without the defendant's fault; unless, at the time, by some grant, he was entitled to additional support from the land of the defendants. There were no circumstances in this case from which to infer any such grant, as to the new house, because it had not stood twenty years; nor, as to the old house, because, though erected more than twenty years since, it did not appear that the earth under it might not have been excavated within twenty years; and no grant could, at all events, be inferred; nor could the right to any easement become absolute, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land.¹

§ 235. There is also a condition imposed upon the party entitled to support, that he shall do nothing to increase the burden imposed upon his neighbor, as by neglecting to keep his premises in sufficient repair; for if, in making an excavation, the adjoining building falls in consequence of its infirm condition, it is not a damage done by the excavation;² and yet it appears, from the same decision, that if the building, in the ordinary progress of decay, would have fallen in a short time, the neighbor had still no right to accelerate its fall, by removing its support. And where the owner of a lot builds upon it, he builds at his own peril; for it is not possible for him, merely by building upon his own ground, to deprive any other party of the use of his, in such manner as he or they shall deem most advantageous.³

§ 236. Where a party is entitled to an easement of support from his neighbor's building, the premises can only be used in subjection to such easement. And it will be an invasion of that right if he does any injury to his neighbor's building in pulling down his own, although done with ever so much care. So, where there had been a grant of the minerals under the land, and the defendant removed them in such a manner as to cause the surface of the earth to fall in, this was held to be a violation of the easement of support, which the plaintiff was entitled to, however done.⁴ A

¹ *Partridge v. Scott*, 3 M. & W. 220. In all that class of cases where the mode of enjoyment is turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises, by which he may in any way be injured.

Per Gardiner, J., in *Hay v. The Cohoes Co.*, *supra*.

² Per Taunton, J., in *Dodd v. Holme*, 1 Ad. & E. 606, *supra*.

³ *Thurston v. Hancock*, 12 Mass. 221.

⁴ *Trower v. Chadwick*, 3 Bing. N. C. 384; *Harris v. Ryding, Gale & Whatley*, Easements, 265.

liberty to hang out linen to dry, on lines passing over the soil of another, is an easement which is recognized in the books. But as the plaintiff, in the case referred to, claimed a liberty for himself and the other tenants to hang linen as often as they had occasion to do so, at their free will and pleasure, and the jury found that he had liberty to dry the linen of his own family only, he was nonsuited.¹

(g.) *How an Easement may be Created or Extinguished.*

§ 237. The origin of every easement is to be referred to some agreement express or implied. It can only be created by a grant, or by prescription which supposes a grant; but uninterrupted possession or enjoyment for at least twenty years is held to be sufficient evidence from which a jury may presume a grant.² A mere license is not sufficient for this purpose; and where a man, for a valuable consideration, gives another the liberty to cut a drain, or the like, over his premises, although it gives no interest in the land itself, it is yet a claim to a freehold right, and cannot be created without a deed.³ So the right of permanently occupying one's own land, in such a manner as to deprive the adjoining owner of an easement, cannot be acquired by a parol license; such license being revocable, even after it has been executed. But a license is a justification for acts done under it, while unrevoked; and the defendant may give such parol license in evidence, and defeat the plaintiff's claim for damages sustained while the license remained unrevoked.⁴

§ 238. Easements, like all other incorporeal rights, can only be assigned by an instrument under seal; a paper writing, however, or even a parol declaration, may be made use of as evidence, to show the character of an act done, or a cessation of enjoyment.⁵ Being rights attached to the estate, and not to the person of the owner of the dominant tenement, easements follow the estate into

¹ *Drewell v. Towler*, 8 B. & Ad. 785.

² *Lasala v. Holbrook*, 4 Paige, 169; *Angell on Watercourses*, 77; *Townsend v. McDonald*, 12 N. Y. 381.

³ *Cook v. Stearns*, 11 Mass. 588; *Thompson v. Gregory*, 4 Johns. 81; *Hays v. Richardson*, 1 Gill & J. 366.

⁴ *Miller v. Aub. & S. R. R.* 6 Hill, 61

⁵ *Co. Lit.* 264, b; *Com. Dig. Release* (A. I.), (B. I.). An easement in real

estate, whether acquired by grant or prescription, may be extinguished or modified by a parol license, granted by the owner of the dominant tenement, and executed by the owner of the servient tenement; and a parol license, which if given by deed would create an easement, is revocable, although executed by the licensee. Per *Metcalf, J.*, in *Morse v. Copeland*, 2 Gray, 302.

the hands of an assignee or lessee. They are also a charge upon the servient tenement, and follow it into the hands of any person to whom such tenement, or any part thereof, is subsequently conveyed. As the right is annexed to the estate, for the benefit of which the easement or servitude is created, it is not destroyed by a division of the estate to which it is appurtenant. The assignee of any portion of that estate may claim the right so far as it is applicable to his part of the property; provided the right can be enjoyed, as to separate parcels, without any additional charge or burden to the proprietor of the servient tenement.¹

§ 239. A mere change in the mode of enjoyment will not destroy an easement; nor will the pulling-down of a house, for the purpose of repair, cause the loss of any easement attached to it, provided there is evidence of an intention to rebuild it within a reasonable time.² But it may be extinguished by a renunciation of the party, either express or implied, or by permitting the party, from whom the servitude is due, to build on the property such works as presuppose an abandonment of the right.³ It may also be lost by non-user, unless an intention of resuming the right within a reasonable time is shown, when it ceased to be used.⁴ In a recent case, it appeared that the plaintiff, having some ancient windows, pulled down the wall in which they were situated, and rebuilt it on the wall of a stable, without any window. About fourteen years after this the defendant erected a building in front of this blank wall, and, after such building had remained there about three years, the plaintiff reopened the window in the same place that one of the ancient windows had formerly occupied, and brought his action for the obstruction to his newly opened window, by the defendant's building, but he was not permitted to recover. Mr. Justice Abbott, in delivering his judgment, said, if a person entitled to ancient lights pulls down his house, and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for any considerable period of time, it lies upon him at least to show, that at the time

¹ *Hills v. Miller*, 3 Paige, 254.

² *Hall v. Swift*, 4 Bing. N. C. 381; *Luttrell's case*, 4 Co. 86; *Pope v. Devereux*, 5 Gray, 409.

³ *Taylor v. Hampton*, 4 McCord, 96.

⁴ *Corning v. Gould*, 16 Wend. 531. The doctrine of extinction by disuse does not apply to servitudes on easements which

have been created by deed. *Smiles v. Hastings*, 24 Barb. 44. In such case there must not only be a disuse by the owner of the land dominant, but an actual adverse user by the owner of the land servient. *Angell on Waterc.* 269; *Arnold v. Stevens*, 24 Pick. 106; *White v. Crawford*, 10 Mass. 189.

when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual but a temporary abandonment of the enjoyment, and that he intended to resume the enjoyment of those advantages within a reasonable time. And the other justices concurred that the right to such an easement is acquired by enjoyment; continuing so long as the party either continues that enjoyment or shows an intention to continue it; and that the ceasing to enjoy it destroys the right, unless, at the time when the party discontinues the enjoyment, he does some act to show that he means to resume it within a reasonable time.¹ In a more recent case, however, in the State of New York, it was held that one omission by the owner, during twenty years, to make use of water-rights, does not impair his title, or confer any right thereto upon another; and that it is not the non-user by the owner, but the adverse enjoyment by another during twenty years, which destroys his right.²

§ 240. In another case, Tindal, C. J., said, suppose a person, who formerly had a mill upon a stream, should pull it down and remove the works, with no intention to return, could it be held that the owner of other land, adjoining the stream, might not erect a mill, and employ the water so relinquished; or that he should be compelled to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own. In such a case, it would undoubtedly be a subject of inquiry for a jury, whether he had completely abandoned the use of the stream,

¹ *Moore v. Rawson*, 8 B. & C. 332; *Manning v. Smith*, 6 Conn. 289; *Pritchard v. Atkinson*, 4 N. H. 1. The case in the text has been adopted, rather for the sake of illustrating a principle applicable to the extinguishment of easements in general than to lights in particular. In fact, the modern English doctrine on the subject of light and air is held to be an anomaly in the law, and has not been generally adopted in the United States. *Myers v. Gemmel*, 10 Barb. 537; *Parker v. Foote*, 19 Wend. 309. It cannot be applied in the growing cities and villages of this country, without producing mischievous consequences; and, indeed, seems never to have been sanctioned in Westminster Hall until 1786, in the case of *Darwin v. Upton*, 2 W'ma. Saund. 175, n., which was a clear departure from the old law. *Bury v. Pope*, Cro. El. 118; 3 Kent, Com. 448; *Hoy v. Sterret*, 2 Watts, 331; *Banks v. Am. Tr. So.*, 4 Sandf. Ch. 465. In Illinois, however, the modern English doctrine has been adopted. *Gerber v. Geabel*, 16 Ill. 217. And, in New Jersey, the Chancellor prevented by injunction the obstruction of light enjoyed for twenty-one years. *Robeson v. Pittenger*, 1 Green, Ch. 57. In South Carolina, also, it was in one case held to be a reasonable right, contributing to the comfort and value of a person's habitation. *McCready v. Thomson*, 1 Dudl. 131. But the law is now otherwise in that State. *Napier v. Dulwinkle*, 5 Rich. 311. And in Massachusetts, although the question was for some time left open; see *Story v. Odin*, 12 Mass. 157; *Atkins v. Boardman*, 2 Metc. 475; *Same v. Chilson*, 7 id. 398; *Fifty Assoc. v. Tudor*, 6 Gray, 261; it is now settled that no such easement can be acquired by prescription, both by common law; *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dee*, 14 id. 588; *Richardson v. Pond*, 15 id. 387; and by statute, Gen. St. c. 90, § 82.

² *Townsend v. McDonald*, 12 N. Y. 381.

or left it for a temporary purpose only.¹ And where an ancient window had been filled up with brick and mortar for twenty years, Lord Ellenborough held the case stood as if the window had never existed.² It may be observed here, also, that the doctrine of extinguishment by disuse does not apply to easements created by deed. To become extinguished by disuse, an easement must have been acquired by use; in the latter case, mere disuse for a sufficient length of time will work an extinguishment, but if founded on a grant, then there must not only be a disuse by the owner of the dominant land, but there must be an actual adverse user by the owner of the servient land.³

§ 241. The encroachment by one party, upon a way held in common with another, by building part of the wall of a house upon a portion of it, and enclosing another portion within a fence, works an extinguishment of the way by operation of law, especially where the other party sells his interest after such acts done, and the purchaser, on his part, acquiesces in and confirms what has been done. The acts relied on to show an extinguishment must be such as clearly indicate an intention to abandon the right to the easement or servitude; and where there are no circumstances intimating the suspension to be temporary only, a *bonâ fide* purchaser will be protected in the enjoyment of the property, as it appeared at the time of the purchase. Where the case is questionable, the usual course is to leave it to the jury to say, whether they will presume a grant; but where the fact of adverse possession is beyond dispute, the law itself raises the presumption.⁴

§ 242. If the act which prevents the servitude is the act of the party having the dominant tenement, it will effect an extinguishment of the right. But if it is prevented by the act of God, or by the operation of the law, it will only cause a suspension of it; for the act of a party will be construed most strongly against him-

¹ *Liggins v. Inge*, 7 Bing. 698; *Martin v. Goble*, 1 Camp. 320; *Garritt v. Sharp*, 3 Ad. & E. 325.

² *Lawrence v. Obee*, 8 Camp. 514; *Curtis v. Jackson*, 18 Mass. 507; *Blanchard v. Bridges*, 4 Ad. & E. 176.

³ *Jewett v. Jewett*, 16 Barb. 160; *White v. Crawford*, 10 Mass. 188; *Arnold v. Stevens*, 24 Pick. 106.

⁴ *Corning v. Gould*, 16 Wend. 581. Abandonment is a simple non-user of an easement; and, in order to make out an effectual answer to the claim upon that ground, I find it perfectly well settled,

that the enjoyment, nay, all acts of enjoyment, must have totally ceased for the same length of time that was necessary to create the original presumption. The non-user for twenty years, affords a presumption, either that the former presumptive right was extinguished, in favor of some other adverse right, or if none such appears, that it has been surrendered if it ever existed. A mere non-user is sufficient to produce this effect, without showing the erection, or permission to erect, a permanent obstruction. Per Cowen, J.

self, but he shall not be injured by an act of God or the law. So it may be extinguished by an obstruction of a permanent nature, by the party himself to whom the service is due, or by his consent, or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise of it.¹ A right of way is not lost by non-user for less than twenty years;² nor can a mill-privilege be considered as extinguished or abandoned by disuse, until such disuse has continued entire and complete for twenty years.³ But twenty-one years' occupation of land, adverse to a right of way, bars the right.⁴

§ 243. The exclusive enjoyment of an easement for twenty years, without interruption, as we have seen, raises a presumption of title in favor of the occupant, entitling him to claim by prescription. But as prescription is founded on the supposition of a grant, the use or possession on which it is based must be clearly adverse to the claim of some other person, or of a nature indicating that it is claimed as a right, and not the effect of indulgence, or of any compact short of a grant.⁵ According to the English law, a prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, or at will, cannot *prescribe*; for a prescription, by that law, is usage beyond time of memory, it is absurd that he should pretend to prescribe whose estate commenced within the remembrance of man; such tenants, therefore, must prescribe under cover of the tenant in fee-simple.⁶ In New York, Massachusetts, and other States, it is acquired by twenty years' uninterrupted possession. In Connecticut and Vermont, by fifteen years' possession.⁷ In South Carolina, it is said to be thirty years.⁸ But it has been held not to exist at all in New Jersey,⁹ or in Pennsylvania.¹⁰ And, in Virginia, twenty-seven years' possession has been held to be an insufficient ground for presuming a grant.¹¹

¹ Taylor v. Hampton, 4 McCord, 96; Hall v. Swift, 6 Scott, 167.

² Emerson v. Wiley, 10 Pick. 310; Holmes v. Buckley, 1 Eq. Cas. Abr. 27.

³ Hurd v. Curtis, 7 Metc. 94.

⁴ Yeakle v. Nace, 2 Whart. 123; Moore v. Dame Browne, Dyer, 319, b. pl. 17.

⁵ Gayetty v. Bethune, 14 Mass. 53; Lawton v. Rivers, 2 McCord, 445; Thacher v. Cobb, 5 Pick. 425; 2 Bl. Com. 265; Parker v. Foote, 19 Wend. 309. It is said,

however, that as respects a public navigable river, twenty years' possession of the water at a given level is not conclusive as to this right. Vooght v. Winch, 2 B. & A. 662.

⁶ 2 Bl. Com. 265.

⁷ Manning v. Smith, 6 Conn. 289; Mitchell v. Walker, 2 Aik. 266.

⁸ Lawton v. Rivers, 2 McCord, 445.

⁹ Ackerman v. Shelp, 3 Halst. 125.

¹⁰ Young v. Collins, 2 Browne, 293.

¹¹ Bolling v. The Mayor, 3 Rand. 568.

CHAPTER VII.

OF COVENANTS AND CONDITIONS.

§ 244. A LARGE proportion of the rights and liabilities of both landlord and tenant arises out of the *covenants* between the parties. Some of these covenants are incident to the relation subsisting between them, and are obligatory independent of positive stipulation, while others are the subject of express contract only. Such rights may also be qualified or limited by some *condition* annexed to the estate, which may either operate as a covenant, or terminate the estate according to circumstances.

SECTION I.

OF COVENANTS.

§ 245. A *covenant* is an agreement between two or more persons, by an instrument under seal, to do or not to do some particular thing. It can only be created by deed, but it may be by a *deed-poll* (the party being named in the deed),¹ as well as by *indenture*;² and where lands are conveyed by indenture to a person who does not seal the deed, yet, if he enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it.³ Covenants are either *express* or *implied*, or, as they are otherwise termed, *covenants in deed*, and *covenants in law*.

§ 246. Express covenants are such as are created by the words of the parties, declaratory of their intention. No precise or technical language is necessary for this purpose;⁴ it may be put in the

¹ *Green v. Horne*, 1 Salk. 197; *Randel v. Ches. & Del. Canal Co.*, 1 Harringt. 151, 238. 446; *Rawson v. Copland*, 2 Sandf. Ch. 251; *Blyer v. Monholland*, *ib.* 478.

² 1 Rol. Abr. 517; *Day v. Brown*, 2 Ham. 345. ⁴ *Davis v. Lyman*, 6 Conn. 249; *Bull v. Follett*, 5 Cow. 170; *Lant v. Norris*, 1 Burr. 290, per Ld. Mansfield. Where words importing a covenant are intended to operate

³ Co. Lit. 230, b.; *Trotter v. Hughes*, 12 N. Y. 74; *Halsey v. Reed*, 9 Paige, as a condition, they are always express to

form of a condition, an exception,¹ or even a recital;² for whenever the intention of the parties can be collected out of the instrument, agreeing to do, or not to do, a particular thing, it is sufficient.³ Thus, if it is agreed between two persons under seal, that one shall pay the other a sum of money for his lands on a particular day, these words will amount to a covenant, on the part of the latter, to convey the lands on that day.⁴ So, where an office had been conveyed by the plaintiff to the defendant, *provided*, that out of the first profits he should pay the plaintiff £500, it was held, that as this proviso was in the nature of a covenant, and not by way of *condition or defeasance*, an action of covenant would lie upon it.⁵ And with respect to words, which are not in form either a covenant or condition, they will be construed to be either the one or the other, where, without such construction, the party has no remedy; while the leaning of the law against forfeitures always inclines the courts to call them a covenant rather than a condition, where the remedy can be legally attained by such a construction.⁶

§ 247. In general, wherever circumstances exist from which an agreement between parties may be inferred, they are equivalent to an express promise.⁷ As where a lease was made, on *condition*

that point. *Surplice v. Farnsworth*, 7 M. & G. 576, 584.

¹ *Holder v. Taylor*, 1 Rol. Abr. 518, l. 19; *Russell v. Gulwel*, Cro. El. 667; *Lowell S. Cong. M. H. v. Hilton*, 11 Gray, 407.

² *Penn v. Preston*, 2 Rawle, 14; *Barfoot v. Freswell*, 8 Keb. 465.

³ *Hallett v. Wylie*, 8 Johns. 44; *Hill v. Carr*, 1 Ca. in Ch. 294; *Randall v. Lynch*, 12 East, 182; *Chancellor v. Poole*, Doug. 766; *Johnson v. Boyfield*, 1 Ves. 314; *Livingston v. Stickles*, 8 Paige, 398. The leading rule of construction always is, that contracts are to be expounded so as to carry into effect the intention of the parties appearing on the face of the whole instrument; not from particular expressions, but *ex antecedentibus et consequentibus*, according to the reasonable sense and construction of words. *Davis v. Lyman*, 6 Conn. 249; *Watchman v. Crook*, 5 Gill & J. 289; *Quackenboss v. Lansing*, 6 Johns. 49; *Marvin v. Stone*, 2 Cow. 781; *Iggulden v. May*, 7 East, 241; *Browning v. Wright*, 2 B. & P. 18; *Doe v. Abel*, 2 Maule & S. 541; *Nind v. Marshall*, 1 Brod. & B. 319. A covenant cannot be controlled by a verbal agreement; but parol evidence of fraud or mistake in a covenant is ad-

missible. *Hustons v. Winans*, 8 Wend. 163; *Thomson v. White*, 1 Dall. 424; *Christ v. Diefenbach*, 1 S. & R. 464; *McRea v. Purmort*, 16 Wend. 460. Ambiguous expressions are to be construed, most strongly, against the party using them. But if two opposite intentions are expressed, the first in order shall be preferred; or, if one of two things is to be done, the option is in the person who is to perform it. *Shep. Touch.* 166; *Rubery v. Jervoise*, 1 T. R. 229; *Dann v. Spurrier*, 8 B. & P. 399; *Hoover v. Clark*, 3 Murph. 169; *Randel v. Ches. & Del. Canal Co.* 1 Harringt. 283; *Cartwright v. Amatt*, 2 B. & P. 43; *Layton v. Pearce*, Doug. 15.

⁴ *Pordage v. Cole*, 1 Saund. 319.

⁵ *Clapham v. Moyle*, 1 Lev. 155.

⁶ *Aiken v. Albany, V. & C. R. R.*, 26 Barb. 289. But see *Palmer v. Fort Plain & C. Co.*, 11 N. Y. 876. Thus in a deed to a railroad company, not executed on their part, but accepted, a provision that the company is "to construct crossings" creates an obligation on their part which may be enforced. *Aiken v. Albany Co.*, *supra*.

⁷ *Lamb v. Bunce*, 4 Maule & S. 275.

that the lessee should keep and leave the houses at the end of the term, in as good plight as he found them; the lessee was held liable for omitting to leave the houses in good repair, for here an agreement to that effect was understood.¹ So in the case of a lease for years *rendering rent*, the word *render* was adjudged to amount to a covenant to pay rent.² But wherever the words do not amount to an agreement, or are merely conditional for the purpose of defeating the estate or relate to some collateral act or matter not parcel of the demise; as, if a lease be granted *provided and on condition* that the lessee collect and pay the rents of the other houses of the lessor, covenant is not maintainable, for these words are evidently intended to limit the estate.³ And it is immaterial in what part of the deed a covenant is inserted, for in its construction, the whole deed must be taken into consideration, in order to discover the meaning of the parties. Such meaning is to be collected from the whole context of the instrument, as well from that which precedes as from what follows the covenant, according to the reasonable sense of the words.⁴

§ 248. Words, in the form of an exception, may amount to a covenant; as where a lessee agreed that he would, "during the term, plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheepwalk), in a regular and due course of husbandry, according to the custom of the country," the exception was held to be as much of an agreement as the rest of the stipulation in which it was placed, and to import a direct obligation not to plough the rabbit-warren and sheepwalk.⁵ So were the words, that A. should take firebote, without cutting more than was necessary.⁶ But on a covenant by a lessee, "to repair the demised premises (principal timber only excepted)," the lessor was held not to be obliged to deliver the timber; for the exception amounted to no more than that he was to provide it ready for the defendant to carry.⁷

¹ Bac. Abr. Cov. A.; Rol. Abr. 518.

² *Giles v. Hooper*, Castle, 135; *De-lancey v. Ganong*, 9 N.Y. 9; so, where in a lease of a coal mine lessee agreed not to injure surface in removing coal, and this was spoken of as a condition, it was held only a covenant. *McKnight v. Kreutz*, 51 Pa. St. 232.

³ *Geery v. Reason*, Cro. Car. 128; *Simpson v. Titterell*, Cro. El. 242; *Ld. Cromwell's case*, 2 Co. 71, b. Where the language imports a condition merely, and there are no words importing an agree-

ment, it cannot be enforced as a covenant but the only remedy is through a forfeiture of the estate. *Palmer v. Fort Plain & C. Co.* *supra*.

⁴ *Knickerbacker v. Killmore*, 9 Johns. 106; *Davis v. Lyman*, 6 Conn. 249; *Ludlow v. McCrea*, 1 Wend. 228; *Plowd. 829*, cited by Lord Ellenborough in *Iggulden v. May*, 7 East, 241.

⁵ *Duke of St. Albans v. Ellis*, 16 East, 852.

⁶ *Stevinson's case*, 1 Leon. 824.

⁷ *Brailsford v. Parsons*, 1 Lutw. 806;

§ 249. Words of recital, when joined to and considered with the rest of the intent, may be the foundation of a covenant; as, if a man recites in a deed, that he is possessed of a certain interest in land, and assigns it over by the same deed, and thereby covenants to perform all the agreements in the deed, if he is not possessed of such an interest, there is already a breach of the covenant.¹ So, where one entitled to a term for ninety-nine years, "if three persons named should live so long," recited his interest, stating that one life was in being, and then assigned his term, it was adjudged that such recital amounted to a covenant, that the life continued.² And where a lease contained a recital of an agreement with the lessor, that the lessee should pull down an old mill, and build another; and also contained a covenant to keep the new mill in repair, but not for building it,—it was held that the covenant to build was implied in the recital.³ But a recital in a covenant, executed by one of the parties through misapprehension or mistake, will not be regarded by a court of equity as conclusive upon such party; for evidence will be admitted to show that such recital is not true, and that it was inserted in the covenant through misapprehension or mistake.⁴

§ 250. A proviso may, in some cases, amount to nothing more than a covenant; as, where a lease was made to a lessee for life, with a proviso that if the lessee should die within the term of forty years, the executor of the lessee should have it for so many of the years as should amount to the number of forty, to be computed from the date of the lease, the proviso was held only to amount to a covenant.⁵ Or if a lessee for years covenants to repair, "pro-

Stone v. Gilliam, 1 Show. 149. Words are to be taken in their legal sense, where they have one, unless it is apparent, from the contract itself, without reference to any usage between the parties or their predecessors, in antecedent contracts of the same nature, to have been meant in another sense. All contracts must be expounded with reference to their subject-matter, to which end evidence of the state of things existing when they were concluded may be given; and this rule may frequently restrain the most indefinite expressions. The custom of the place, if any such exists, is an implied term of every contract; but a usage cannot be set up in contravention of an express contract. *The Master, &c., v. Howard*, 6 T. R. 388; *Pavey v. Burch*, 3 Miss. 447; *Doe v. Burt*, 1 T. R. 701; *Has-*

sell v. Long, 2 Maule & S. 368; *Gillett v. Newman*, 1 Taunt. 187; *Yeats v. Pim*, 2 Marsh. 141. The subsequent acts of contracting parties are inadmissible to explain their original intention. And the rules for the construction of all contracts are the same, whether the instrument is by parol or under seal. *Clifton v. Walmesley*, 5 T. R. 564; *Seddon v. Senate*, 13 East, 63.

¹ *Severn v. Clerk*, 1 Leon. 122; *Johnson v. Procter*, Yelv. 175; *Browning v. Wright*, 2 B. & P. 25.

² *Best v. Brett*, 1 Rol. Abr. 518; *Hollis v. Carr*, 3 Swanst. 649; *Barton v. Fitzgerald*, 15 East, 530; *Barfoot v. Freswell*, 3 Keb. 465.

³ *Sampson v. Easterby*, 9 B. & C. 505.

⁴ *Rich v. Hotchkiss*, 16 Conn. 409.

⁵ *Parker v. Gravenor*, Dyer, 150, a; 1 Co. 155, a.

vided always, and it is agreed that the lessor shall find great timber, &c.," this creates a covenant on the part of the lessor to find great timber by the word *agreed*, and will not be considered a qualification of the lessee's covenant.¹ But if the word "agreed," or some equivalent expression, is not used, the proviso will not operate as a covenant on the lessor's part, but only as a qualification of the covenant of the lessee; for words in an instrument under seal, evidently by way of condition or defeasance, will not amount to a covenant.² Nor do words expressive of the quantity of land in a deed amount to a covenant that there is such quantity, for they are merely descriptive of the land conveyed.³

§ 251. A license, if under seal, may take effect as a covenant; as where it authorizes the party to whom it is made to go upon the land of the party granting it, to use the land for his own profit; in which case it would be equivalent to a lease. Or it may be limited to some particular purpose, as to cut wood or draw water, and in either case would be supported as a covenant, and effect would be given to it, in the same manner as any other contract. Technically, however, a license is only an authority to do some act, or a series of acts, on the land of another, without passing any estate in the land; and is revocable, so long as it remains executory, unless a definite term is fixed for its continuance; but irrevocable, when executed. Licenses to do a particular act do not trench upon the policy of the law which requires that bargains respecting real estate shall be in writing; and they in general amount to nothing more than an excuse for an act, which would otherwise be a trespass.⁴

§ 252. *Implied* covenants depend for their existence on the intentment and construction of law, and are such as the law raises, from the relation of the parties to each other, or from the use of certain terms in establishing that relation in the absence of any express agreement on the subject between them.⁵ Thus, if

¹ *Holder v. Taylor*, 1 Brownl. 28; *Porlage v. Cole*, 1 Saund. 319; *Samways v. Eldsley*, 2 Mod. 73.

² *United States v. Brown*, 1 Paine, C. C. 422; *Huddle v. Worthington*, 1 Ham. 423.

³ *Powell v. Clark*, 5 Mass. 355; *Beach v. Stearns*, 1 Aik. 325.

⁴ *Davis v. Townsend*, 10 Barb. 333. The same license may operate as a grant as to some things, and a mere license as to others. *Wood v. Leadbitter*, 18 M. &

W. 838; *Cook v. Stearns*, 11 Mass. 538. See also *Thomas v. Sorrell*, Vaugh. 380, 351.

⁵ But covenants thus implied, or covenants in law, must be carefully kept distinct from covenants implied by construction from the words of the agreement; for these last are, properly speaking, *express*. Thus, see *Williams v. Burrell*, 1 C. B. 402, 429, *et seq.* "The distinction between covenants, and the only distinction, we take to be this: they are

land be granted for a term of years, by the words *demise* or *grant*, without any express covenant for quiet enjoyment, the lessee, or his assigns, if the lessor's title is defective, or if ousted by rightful title, may sustain an action on the implied covenant, that the lessor warranted he had a good title at the time of executing the deed; for the word *demise* imports a covenant for quiet enjoyment as well as a power of letting. So the word *grant* implies the power of giving;¹ although it does not constitute a warranty when used in a conveyance of freehold estate.² A covenant is also implied on the part of a lessee, that he will use the land demised to him in a husband-like manner, and not unnecessarily exhaust the soil by negligent or improper tillage.³ And, as a consideration is necessary to every contract, it is implied that the tenant shall pay an annual rent, unless the lease was granted in consideration of a sum in gross. So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to imply a covenant to keep a flock of sheep.⁴

§ 253. It is a well-settled rule, that where there is an express

either covenants by express words, or covenants in law. Co. Litt. 139, b. . . . A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate. . . . But . . . the legal effect and operation of a covenant, whether framed in express terms, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant." Such "an implied covenant is to all intents and purposes an express covenant, and it is only those covenants which the law itself implies that can properly be considered as covenants in law."

The words "yielding and rendering" are accordingly not properly an implied covenant, but an express one, by construction. They are, it is true, often termed an implied covenant, but this can only mean by construction, and that is tantamount to an express covenant; and they should have all the incidents of the latter. See *Hellier v. Gaspard*, 1 Sid. 266; *Newton v. Osborn*, Style, 387; *Bingh. on Real Prop.* 388, 389; and see *Bowen v. Hodges*, 13 C. B. 765, 774.

In only one case was the point decided otherwise; viz., *Kimpton v. Walker*, 9

Vt. 191; though in many text writers and cases *dicta* are found to that effect. But in that case, p. 200, it is admitted that "*the words express the thing to be done, and, in that sense, are express*," which concedes the whole point; for a covenant is express whenever the natural import of the terms, singly or with the aid of construction or inference, expresses the obligation.

¹ *Grannis v. Clark*, 8 Cow. 86; *Frost v. Raymund*, 2 Caines, 188; *Deering v. Farrington*, Freem. 368; *Hackett v. Glover*, 10 Mod. 142; *Spencer's case*, 5 Co. 17; *Barney v. Keith*, 4 Wend. 502; *Wells v. Mason*, 4 Scam. 84; *Folts v. Huntley*, 7 Wend. 210; *Adams v. Gibney*, 6 Bing. 656. A recited antecedent agreement may raise a covenant by implication. *Easterby v. Sampson*, 6 Bing. 644. So the word "*let*," or any equivalent word, imports a covenant of quiet enjoyment. *Hall v. City, &c. Brewery Co.*, 12 Best & S. 787; *Maule v. Ashmead*, 20 Pa. St. 482; *Ross v. Dysart*, 33 id. 452; *Hamilton v. Wright*, 28 Mo. 199. But *Lovering v. Lovering*, 18 N. H. 518, is contra.

² *Spencer's case*, 5 Co. 18, a; *Browning v. Honeywood*, Freem. 389-414. But these words import no covenant in an assignment. *Landydale v. Cheyney*, Cro. El. 157; *Blair v. Rankin*, 11 Mo. 442.

³ *Powley v. Walker*, 5 T. R. 873.

⁴ *Webb v. Plummer*, 2 B. & A. 746.

covenant, the law will not imply one. Thus a covenant of warranty does not imply a covenant of seisin, nor under such a covenant can it be assigned as a breach that there was no such land as the grantor undertook to sell.¹ But an implied covenant may be qualified, enlarged, or restrained by an express covenant;² as, for example, the implied covenant for quiet enjoyment against all persons claiming title, may be enlarged by the lessor's covenanting against disturbances by all persons whatsoever; or narrowed by his covenanting against the acts of such persons only as claim through him. And the implied covenant may still subsist in the deed, provided it is consistent with, and not contradictory to, the express covenant.³ Thus, where there is an express covenant to repair a house, the implied obligation to use it in a tenant-like manner will also form part of the contract.⁴

§ 254. Where a lessee assigns the leasehold premises, "to have and to hold the same in as ample a manner, to all intents and purposes, as the assignor might or could hold the same, and covenants that he had good and lawful right to bargain and transfer the premises, as above written, and that the same are free of all arrearages of rent, and other encumbrances," the covenant is limited to the acts of the assignor himself, and does not amount to a warranty of the landlord's title.⁵ And if, in an under-lease, the sub-lessee covenants to keep down the rent reserved in the original lease, and the superior landlord distrains, at the end of the first quarter of the under-lease, for one quarter's rent due under the superior lease, there will be no implied covenant on the part of the sub-lessor to indemnify his lessee, although the rent in the under-lease is reserved yearly.⁶ So an express covenant against persons named restricts an implied covenant under the word "demise;"⁷ and an express covenant for quiet enjoyment restrains the whole of the implication in the word "demise," which implies two covenants; to wit, a covenant for title, and another for quiet enjoyment.⁸

¹ *Cutter v. Powell*, 6 T. R. 820; *Vanderkarr v. Vanderkarr*, 11 Johns. 122.

² *Kent v. Welch*, 7 Johns. 258; *Sumner v. Williams*, 8 Mass. 201.

³ *Gates v. Caldwell*, 7 Mass. 68; *Christine v. Whitehill*, 16 S. & R. 98.

⁴ *Holford v. Dunnett*, 7 M. & W. 348.

⁵ *Knickerbacker v. Killmore*, 9 Johns. 106.

⁶ *Upton v. Fergusson*, 3 Moore & S. 88.

⁷ *Merrill v. Frame*, 4 Taunt. 329.

⁸ *Line v. Stephenson*, 4 Bing. N. C. 678; s. c. 5 Bing. N. C. 183. A mere parol demise imports only a contract for quiet enjoyment, not for title. *Granger v. Collins*, 6 M. & W. 458; *Bandy v. Cartwright*, 8 Exch. 913; *Vernam v. Smith*, 15 N. Y. 327, 382; *Maule v. Ashmead*, 20 Pa. St. 482; *Carson v. Godley*, 26 id. 117; *Ross v. Dysart*, 38 id. 452.

§ 255. In order to support the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined; ¹ as where the defendant sold the plaintiff a lease for years, and covenanted that *he would not do nor have done* any act to disturb the plaintiff, but that the plaintiff should hold and enjoy without the disturbance of the vendor *or any other person*, it was held that the covenant was confined to acts done or to be done by the vendor, and that the words *or any other person* were to be referred to and regulated by the former part of the engagement. ² So a covenant that the grantors were seised of a good estate in fee, and had good right to convey, was held to be qualified and restrained by a subsequent covenant for quiet enjoyment, without let or interruption by them, their heirs, or persons claiming under them. ³

§ 256. It should be observed also that this distinction between express and implied covenants is important, and not merely technical. Express covenants are construed more strictly than those which are implied, and may be entered into without a consideration, while the latter cannot. ⁴ Implied covenants cannot extend to a thing not *in esse* at the time of the demise; therefore if A., in consideration that B. will build a mill upon the land, and make a watercourse through it, grants and demises the land to B. for a term of years, and afterwards stops the watercourse, B. cannot maintain covenant against him. ⁵ Such covenants are also confined to the party covenanting, and do not bind his representatives; and though the word *demise* in a lease, where there is no express covenant for title, amounts to an implied covenant to that effect, yet if the lessor be tenant for life only, and the remainder-man should oust the lessee, he will have no remedy, on the merely implied covenant, against the executors of the lessor. ⁶

§ 257. The common-law doctrine of implied covenants in leases

¹ *Cole v. Hawes*, 2 Johns. Cas. 208; *Miller v. Heller*, 7 S. & R. 40.

² *Broughton v. Conway*, Moor, 58; *Gale v. Reed*, 8 East, 89; *Nind v. Marshall*, 1 Brod. & B. 319.

³ *Milner v. Horton*, McClel. 647; *Doe v. Meux*, 4 B. & C. 606.

⁴ *Shubrick v. Salmond*, 3 Burr. 1639; *May v. Trye*, 1 Freem. 447. The seal of a covenant always imports a consideration.

⁵ *Huddy v. Fisher*, 1 Leon. 278.

⁶ *McClowry v. Croghan*, 1 Grant's Ca. 211; *Adams v. Gibney*, 6 Bing. 656. The

wisdom of a provision of law which would compel parties to meet every possible case that might happen by an express contract, rather than rely upon the more general extent of implied covenants, as understood by the law, seems very questionable. By attempting to do so, the object is often entirely frustrated; and those things which would certainly come within the general principle of a covenant in law are frequently passed over by a vain attempt at an enumeration of particulars which is intended to have the same effect.

for years was at one time considered abrogated in New York by the provisions of the Revised Statutes which declare that "no covenant shall be implied in any conveyance of real estate whether such conveyance contain special provisions or not;" the words real estate being construed to include leases.¹ But this construction was subsequently denied,² and the contrary doctrine is now held by the Court of Appeals.³

§ 258. With respect to the *parties* to a covenant, we may observe in general, that at common law, a contract made for the benefit of a third person is valid, and may be enforced by him, if he has an interest in the subject-matter of the contract;⁴ but where it is made under seal, and *inter partes*, no one but a party to the instrument can maintain an action for a breach of it.⁵ An indenture, not *inter partes*, will have the operation of a deed-poll, on which an action may be maintained by a party not executing, but to and with whom the covenant is made;⁶ as where A. covenanted with B. to pay him a certain sum of money, and, in the same instrument, also covenanted with B. and C. to pay C. another sum of money, the court were of opinion, that as this was not an indenture between parties, but only a deed-poll, the party might covenant with a stranger, and also with other persons, to do several other acts, for which every one severally might bring his action.⁷ But a party for whose benefit merely a covenant is made cannot maintain an action thereon; nor by a deed *inter partes*, can one who is a party to the deed covenant with another who is no party to it; even for the performance of acts expressly for such third person's benefit.⁸ Yet if one who is a mere stranger, and not named a party (the instrument being *inter partes*), covenants with another who is named, and seals the deed, he is bound by his seal. As where one agreed to let a house to another at a certain rent, and a stranger covenanted, on behalf of the lessee, that the lessee should pay the rent, it was held that on this deed the defendant, although

¹ *Baxter v. Ryerss*, 18 Barb. 284; *Kinney v. Watts*, 14 Wend. 38.

² *Tone v. Brace*, 8 Paige, 597; 11 *id.* 569.

³ *The Mayor, &c. v. Mabie*, 13 N. Y. 151; *Vernam v. Smith*, 15 *id.* 327.

⁴ *Brewer v. Dyer*, 7 Cush. 337; where lessor maintained assumpsit on an agreement, given to the lessee for the rent by one who had received occupation from him. That a mere beneficiary cannot sue, see *Mellen v. Whipple*, 1 Gray, 317. But *Law-*

rence v. Fox, 20 N. Y. 268; *Van Schaick v. Third Av. R. R.* 38 N. Y. 346, are contra.

⁵ *Spencer v. Field*, 10 Wend. 87; *Stone v. Wood*, 7 Cow. 453.

⁶ *Matthewson's case*, 5 Co. 22.

⁷ *Lowther v. Kelly*, 8 Mod. 115; *Lucke v. Lucke*, 1 Lutw. 302; *Cooker v. Child*, 2 Lev. 74; *Van Alstyne v. Van Slyck*, 10 Barb. 383.

⁸ *Haskett v. Flint*, 5 Blackf. 69; *Bleecker v. Bingham*, 3 Paige, 246.

not a party, was liable to an action of covenant, in consequence of his having sealed.¹

§ 259. No action of covenant can be maintained against a lessee claiming under a deed-poll, nor can mutual covenants arise under such an instrument, as it is the deed of one party only.² It would, therefore, be unsafe to dispense with the execution of an indenture by the lessee, on the assumption that his entry and enjoyment under the lease would be sufficient to expose him to an action for a breach of any of the covenants to be performed by him. But a covenantee, without executing the deed, may bring an action of covenant against the covenantor, whether the instrument be by deed-poll or indenture; for the execution by a covenantor fixes his liability.³

§ 260. Covenants in a deed that extend to a thing *in esse*, parcel of the demise, and which touch or concern the estate, *run with the land*, and every part thereof, and bind not only the covenantor and his personal representatives by privity of contract, but also the assignee, though not named, and every other person who is in of any estate created by, or growing out of the original demise, by privity of estate.⁴ And if they relate to a thing not *in esse*, but the thing to be done is upon the land demised, as to build a house or a wall, the assignees, if named, are bound by the covenant.⁵ But if they do not touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound; such covenants being con-

¹ *Storer v. Gordon*, 3 Maule & S. 322; *Metcalf v. Rycroft*, 6 *id.* 75; *Wheelwright v. Beers*, 2 Halst. 391; *Berkeley v. Hardy*, 5 B. & C. 355; *Southampton v. Brown*, 6 B. & C. 718.

² *Chancellor v. Poole*, 2 Doug. 764; *Staines v. Morris*, 1 Ves. & B. 14; *Wilkins v. Fry*, 1 Mer. 266; *Sutherland v. Lishnan*, 3 Esp. 42; *Kimpton v. Eve*, 2 Ves. & B. 353. *Burnett v. Lynch*, 5 B. & C. 589. So *Trustees v. Spencer*, 7 Ohio, 493; where a lessee under a sealed lease, who had entered but not sealed, was held not liable to lessor in covenant. But in *Aiken v. Albany, &c. R. R.*, 26 Barb. 289, the grantee in a deed-poll who had entered was held bound by acts covenanted to be done by him, though the words were the grantor's; and, in *Finley v. Simpson*, 2 Zab. 311, and *McLaughlin v. McGovton*, 34 Barb. 208, the same doctrine was laid down, with regard to a lessee by indenture who had entered, but neither signed nor

sealed the lease, and to the same point are *Co. Lit.* 231, a; *Lock v. Wright*, 8 Mod. 40. But the opposite doctrine was laid down in *Platt, Cov.* 10-12; and was held in *Maule v. Weaver*, 7 Pa. St. 329; *Irish v. Johnston*, 11 *id.* 488.

³ *Smith et al. v. Kerr*, 3 N. Y. 144; *Petrie v. Bury*, 3 B. & C. 353; *Vernon v. Jefferys*, 2 Stra. 1146; *Codman v. Hall*, 9 Allen, 335.

⁴ *Spencer's case*, 5 Co. 16, 1st resolution.

⁵ *Spencer's case*, *supra*, 2d resolution. So a covenant to insure a building covenanted to be erected by the lessor as parcel of the demise, runs, though the word assigns is not added. *Masury v. Southworth*, 9 Ohio St. 340. Whether a covenant to deliver up would so run was doubted in *Sargent v. Smith*, 12 Gray, 426, and denied by *Parke, B.*, in *Doe v. Seaton*, 2 C. M. & R. 780.

sidered mere *personal covenants* not affecting the land demised, but merely collateral to it.¹

§ 261. In order that a covenant may run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment.² It must not only concern the land, but there must also be a privity of estate between the contracting parties;³ for if a party covenant with a stranger to

¹ Spencer's case, *supra*, 2d resolution; *Dolph v. White*, 12 N. Y. 296; *Mayor, &c. v. Pattison*, 10 East, 130; *Curtis v. White, Clarke*, 389. The rules laid down in the text are only stated as applicable to the lessee's covenants. But they apply equally to lessor's, which will run with the land demised, and ensue to the lessee's assigns under similar conditions. At common law the assignees of reversions were neither bound by nor could take advantage of the covenants or conditions in the lease, although these were of a nature to run with the land. This was altered by Stat. Hen. VIII. c. 34, as to assignees of reversions on leases for life or years. To what extent, when there was no tenure or privity between the parties, or when the demise was in fee, covenants will run, is examined in note 1, *post*, to § 261.

² *Norman v. Wells*, 17 Wend. 186; see *post*, § 444. Much learning has been expended, and sometimes to little purpose, in endeavoring to define the boundary between real covenants, or such as run with the land, and those which are merely personal. A most elaborate effort to accomplish this end was made by Mr. Justice Cowen, in *Norman v. Wells*; and yet, after all his researches, that indefatigable judge was forced to declare that the authorities still left the application of old principles to new cases a very nice exercise of the mind, and remaining, in greater degree, a matter for judicial discretion, than almost any other of equal importance in the law of property. Per Harris, J., in *Van Rensselaer v. Bonesteel*, 24 Barb. 867.

³ The rule fully stated is, that in order to the burden of the covenant running with the land and binding the assigns of the covenantor there must have been a privity of estate — as between landlord and tenant — between the contracting parties at the time of the contract; but the benefit of a covenant touching the land will run with the land though the covenantor is a stranger. The latter was settled as long ago as 42 Ed. III. 3; the case of the Prior and Convent, stated and followed in Spencer's case, 5 Co. 16; is well established law, and is the ground of recovery on covenants of

title by assignees of a grantee in fee. The former has been much debated, but is, on the whole, settled as stated, *supra*. Thus where the covenanting parties never had any interest in the land, their assignees are not bound. *Hurd v. Curtis*, 19 Pick. 469; *Keppell v. Bailey*, 2 Mylne & K. 517; *Plymouth v. Carver*, 16 Pick. 183. So a covenant by lessor with lessee not to exercise a particular trade on another parcel of lessor's land does not bind a grantee of the latter parcel for, *quoad hoc*, they are strangers. *Taylor v. Owen*, 2 Blackf. 301. So since the statute of *quia emptores*, which abrogated privity of estate and tenure between grantor and grantee on a conveyance in fee, covenants thereon will not run with the land to bind assigns; thus to pay rent, it being a rent charge. *Brewster v. Kidgill*, 12 Mod. 166, explained in 1 Smith Lead. Ca. 32; *Coke v. Arundel*, Hardr. 87. But where this statute is not in force, as in Pennsylvania, privity exists between lessor and lessee in fee; the rent reserved is a rent service, and a covenant to pay it binds assigns of lessee in the land. *Dunbar v. Jumper*, 2 Yeates, 74; *Ingersoll v. Sargent*, 1 Whart. 348; *Royer v. Ake*, 3 Pa. 461; *Herbaugh v. Zentmyer*, 2 Rawle, 159; *Hannen v. Ewalt*, 18 Pa. St. 9. In New York, the law was so held; *Van Rensselaer v. Brady*, 8 Den. 135; until 1852, when the case of *Depeyster v. Michael*, 6 N. Y. 467, held that by statutes of 1779 and 1787, the statute of *quia emptores* had been re-enacted, and no tenure or privity existed on a lease in fee. This, denying privity, seemed to conclude any liability of the assignee of the lessee in fee on the latter's covenants touching the land. But in *Van Rensselaer v. Hays*, 19 N. Y. 68, the law was held otherwise by force of statute 1805, c. 98; and though the rent was a rent charge and not a rent service, the assignee was bound to its payment. The statute of 1805 was repealed in 1860, c. 396; but the same doctrine was decided to exist at common law; *Van Rensselaer v. Read*, 26 N. Y. 558; while in *Same v. Slingerland*, *ib.* 580, the statute of 1846, c. 274, was held to give the same rights in ejectment; and these in *Same v. Dennison*,

pay a certain rent, in consideration of a benefit to be derived under a third person, it cannot run with the land, not being made with the person having the legal estate.¹ And if the assignee of the reversion or term come in of a different estate to that held by the lessor or lessee, he cannot sue or be sued on the covenants running with the land for want of privity.² Thus, if a party, having only an equitable fee in a freehold, grants a lease, and then devises the equitable fee to A., and, after the death of the testator, A. acquires the legal estate from the person in whom it was vested at the time of the lease and devise, and then sells and conveys the legal estate to B., the latter cannot sue the lessee or his assignees, because he is not in of the same estate as the lessor.³ There is no difference between express and implied covenants, as to their running with the land;⁴ but mere equitable covenants do not run with the land.⁵

85 *id.* 98, were held to exist by common law, on conditions in deed, and that the statute of 1787 only affected conditions in law; and these doctrines were adopted in *Tyler v. Heidorn*, 46 Barb. 439, after a full review of the cases, the ground taken being that the reservation of a rent in fee, like its grant, created an incorporeal hereditament, producing privity and a right and liability on the covenants annexed. And in *Van Rensselaer v. Barringer*, 39 N. Y. 9, *Hosford v. Ballard*, *ib.* 147, the law was declared settled beyond discussion.

¹ *Demarest v. Willard*, 8 Cow. 206; *Webb v. Russell*, 8 T. R. 393; *Allen v. Woolley*, 1 Blackf. 148. But see *Willard v. Tillman*, 2 Hill, 274.

² Co. Lit. 215; 1 Saund. 240, a. Though there should be a total want of right in the original covenantor, if his deed transfers the possession, and that possession passes by subsequent conveyances, the original covenants pass therewith. The naked possession is an estate, and covenants real before breach pass with it. *Beddoe's Ex'or v. Wadsworth*, 21 Wend. 120. Thus the covenant made by the donee of a power of appointment will not bind his appointees, as they do not succeed to his estate, but to the donor's. *Roach v. Wadham*, 6 East, 289. So where covenants are not annexed to the reversion to which plaintiff succeeds, *Cardwell v. Lucas*, 2 M. & W. 111; *Cooch v. Goodman*, 2 Q. B. 580.

³ *Whitton v. Peacock*, 2 Bing. N. C. 411.

⁴ *Vyvyan v. Arthur*, 1 B. & C. 410.

⁵ *Whitton v. Peacock*, *supra*. Covenants are ordinarily spoken of as running with the land. How far they run with in-

corporeal interests in land the cases are not agreed. In England, the benefit of a covenant to pay rent will not run with the rent alone. *Milnes v. Branch*, 5 Maule & S. 411; per Parke, B., *Randall v. Rigby*, 4 M. & W. 135; and yet a covenant to pay tithes ran with the tithes. *Bally v. Wells*, 8 Wils. 25; and see *Egremont v. Keene*, 2 Jones, Exch. 307; *Muskett v. Hill*, 5 Bing. N. C. 694; *Williams v. Hayward*, 1 Ellis & E. 1040. In this country, it has been thought that a covenant to pay rent on a lease for life or years, will run with the rent alone; see *Willard v. Tillman*, 2 Hill, 274; *Demarest v. Willard*, 8 Cow. 206; *Patten v. Deshon*, 1 Gray, 325. And the same was held of rent on a lease in fee in Pennsylvania, *Streaper v. Fisher*, 1 Rawle, 155; *St. Mary's Church v. Miles*, 1 Whart. 229; *Scott v. Lunt*, 7 Pet. 596. But the sounder view is otherwise both with regard to the former; *Allen v. Woolley*, 1 Blackf. 148; per Bronson, C. J. in *Willard v. Tillman*, 2 Hill, 276; and the latter class of rents; *Devisees Van Rensselaer v. Platner*, 2 Johns. Ca. 24; *Irish v. Johnston*, 11 Pa. St. 488. In New York, however, by the statute of 1805, assignees of a rent-charge were held entitled to maintain covenant therefor. *Van Rensselaer v. Hays*, 19 N. Y. 68; and since the repeal of this statute, in 1860, the same right has been held to exist at common law. *Van Rensselaer v. Read*, 26 *id.* 558; *Tyler v. Heidorn*, 46 Barb. 439. Covenants, it seems well settled, will run with a transfer of the possession of land without title on the ground of estoppel, if the want of title does not appear by the pleadings. *Beddoe's Ex'or v. Wadsworth*, 21 Wend. 120; *Slater*

§ 262. Covenants implied in law run with the land: so do covenants for quiet enjoyment;¹ to insure, if the insurance is to be laid out in rebuilding;² for further assurance;³ to repair;⁴ to discharge the lessor from taxes and assessments, ordinary or extraordinary;⁵ to permit the lessor to have free passage to two rooms excepted in the demise;⁶ to cultivate the land in a particular manner;⁷ or with laborers from a particular locality;⁸ to maintain a partition fence;⁹ not to carry on particular trades;¹⁰ not to erect any building in front of the demised premises;¹¹ nor to put in operation a rival mill.¹² A covenant by a lessor to supply two houses with water, at a rate therein mentioned for each house, runs with the land; and, for a breach of it, the assignee of the lessee may maintain an action against the reversioner;¹³ but a covenant by a lessor to pay, on a valuation for all trees planted by the lessee, does not run with the land.¹⁴ Where there was an exception in the lease of an entry, with liberty to wash in the kitchen, and a passage there for that purpose, it was held that an action would lie against an assignee for hindering the lessor; because a covenant relating to a way, or other profit appurtenant, goes with the tenement and binds the assignee.¹⁵ The right of renewal, also, constitutes a part of the tenant's interest in the land, and a covenant to renew is consequently binding upon the assignee of the reversion. The grant of an additional term is, in fact, for many purposes considered a continuation of the former lease; and if there is nothing in the lease to show that the renewal was intended to be confined person-

v. Rawson, 6 Metc. 489; *Fowler v. Poling*, 2 Barb. 300; *Barker v. McCoy*, 3 Ohio, 211; *Foot v. Burnet*, 10 *id.* 317; *Devore v. Sunderland*, 17 *id.* 52; *Dickinson v. Hoomes*, 8 Gratt. 353; *Webb v. Austin*, 8 Scott, N. R. 419; *Gouldsworth v. Knights*, 11 M. & W. 337. But if the want of title appears the action will fail. *Noke v. Awder*, Cro. El. 373, 436; *Andrews v. Pearce*, 4 B. & P. 158; *Pargeter v. Harris*, 7 Q. B. 708; *Carvick v. Blagrove*, 1 Brod. & B. 531.
¹ *Suydam v. Jones*, 10 Wend. 180; *Hunt v. Amidon*, 4 Hill, 345; *Noke v. Awder*, Cro. El. 436; *Campbell v. Lewis*, 3 B. & A. 392.

² *Vernon v. Smith*, 5 B. & A. 1.

³ *Middlemore v. Goodale*, Cro. Car. 503; *Roe v. Hayley*, 12 East, 484.

⁴ *Demarest v. Willard*, 8 Cow. 206; *Dean and Chapter of Windsor's case*, 5 Co. 24; *Shelby v. Hearne*, 6 Yerg. 512; *Kingdon v. Nottle*, 1 Maule & S. 355. So *Myers*

v. Burns, 33 Barb. 401; *Martyn v. Clue*, 18 Q. B. 661; *Payne v. Haine*, 16 M. & W. 541. So even a covenant to pull down and put up, *Harris v. Goslin*, 3 Harringt. 340.

⁵ *Post v. Kearney*, 2 N. Y. 394; *Martin v. Baker*, 5 Blackf. 232.

⁶ *Cole's case*, 1 Salk. 196; *Bush v. Calis*, 1 Show. 389.

⁷ *Cockson v. Cock*, Cro. Jac. 125.

⁸ *Mayor of Congleton v. Pattison*, 10 East, 130.

⁹ *Kellogg v. Robinson*, 6 Vt. 276.

¹⁰ *Tatem v. Chaplin*, 2 H. Bl. 133.

¹¹ *Trustees of Watertown v. Cowen*, 4 Paige, 510.

¹² *Norman v. Wells*, *supra*; *Vyvyan v. Arthur*, 1 B. & C. 410.

¹³ *Jourdain v. Wilson*, 4 B. & A. 266.

¹⁴ *Grey v. Cuthbertson*, 4 Doug. 351; *Twynam v. Pickard*, 2 B. & A. 105; *Simpson v. Clayton*, 4 Bing. N. C. 758, 780.

¹⁵ *Bush v. Calis*, 1 Show. 389.

ally to the lessee, the right under the covenant devolves upon his executors, without their being particularly named.¹

§ 263. But the covenants of seisin, of a right to convey, and against encumbrances,² are personal covenants, not running with the land, or passing to an assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become mere *choses in action*, which are not technically assignable.³ So a covenant on the part of the lessor to pay the lessee, without saying his assigns, for a building not yet erected, to be built during the term, does not run with the land.⁴ Nor are the lessor's covenants to purchase at an appraisal, the permanent improvements made by the lessee; to pay the debt of a third person; or to surrender certain personal chattels; included in a lease, of this character, or in either case, binding upon an assignee.⁵ Covenants running with the land are divisible, and will bind the assignee of a parcel of the estate demised, in respect of the parcel assigned to him, as to repair;⁶ or to pay rent of the part occupied by him.⁷ But as respects the liability of a lessee, it is not altered by a transfer of the whole or a part of his estate; for his privity of contract with the lessor is not thereby determined, and he still remains liable on his covenant to pay the entire rent.⁸

§ 264. Covenants are also *either joint or several*, and sometimes both joint and several. Whether a covenant is joint or several, depends upon the subject-matter of the covenant, and the interest

¹ *Piggot v. Mason*, 1 Paige, 412; *Winslow v. Tighe*, 2 Ball & B. 195; *Randall v. Russell*, 8 Mer. 196; *Hyde v. Skinner*, 2 P. Wms. 196; *Roe v. Hayley*, 12 East, 469; *Vernon v. Smith*, 5 B. & A. 11; *Wilkinson v. Pettit*, 47 Barb. 280. A surety's separate covenant, to guarantee the payment of rent, runs with the land, and passes to the grantee of the reversion, who may sue in his own name upon it. *Allen v. Culver*, 3 Den. 284.

² *Sprague v. Baker*, 17 Mass. 588; *Gilbert v. Bulkley*, 5 Conn. 262.

³ 4 Kent, Com. 459; *Greenby v. Wilcocks*, 2 Johns. 1; *Birney v. Hann*, 8 A. K. Marsh. 322; *Chapman v. Holmes*, 5 Halst. 20; *Bickford v. Page*, 2 Mass. 455. For the same reason, covenants that are broken before an assignment do not pass as incident to the land. *Shelby v. Hearne*, 6 Yerg. 512. But the law is otherwise in England and in the States of Indiana, Ohio, and Missouri, where these covenants are held continuing and running with the land. *Kingdon v. Nottle*, 4 Maule & S. 53; *Martin*

v. Baker, 5 Blackf. 232; *Devore v. Sunderland*, 17 Ohio, 52; *Dickson v. Desire*, 23 Mo. 151; and in Maine, by statute; Rev. Stat. c. 115, § 16.

⁴ *Thompson v. Rose*, 8 Cow. 266.

⁵ *Coffin v. Tolman*, 8 N. Y. 465; *Spencer's case*, 5 Co. 16; *Dolph v. White*, 12 N. Y. 296; *Allen v. Culver*, *supra*; *Gorton v. Gregory*, 3 Best & S. 90.

⁶ *Congham v. King*, 1 Rol. Abr. 522.

⁷ *Stevenson v. Lambard*, 2 East, 575. Where a covenant which runs with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*; and the assignee of each parcel will be answerable for a proportionate part of the common burden, and will be exclusively liable for the breach of any covenant which related to his part alone. *Astor v. Miller*, 2 Paige, 68; *Van Horne v. Crain*, 1 id. 455; *Shep. Touch.* 199; Co. Lit. 885, a.

⁸ *Broom v. Hore*, Cro. El. 638.

that passes by it, and not upon the precise language made use of. The interest which the covenantees have in the performance of the covenant will generally determine the question whether the right of action given by it be joint or several.¹ If the interest is joint, the action must be joint, in the name of all the covenantees; although the words of the covenant are several. And if the interest of the covenantees be several, the covenant will be several, although the terms of it be joint.² If two lessees covenant jointly and severally at the beginning of a lease, these words extend to all their subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor.³ And where a person covenants with two or more, and with each of them, if each of the covenantees takes a several interest or estate, the covenant is several; but where the interest is joint, the word *each* makes no difference, and does not constitute a separate covenant.⁴ It has been held, also, that a covenant with two and *every* of them was joint, though the two were several parties to the deed;⁵ for there is a difference where the parties covenant jointly and severally, and where the covenant is with them and every of them: in the former case the covenantees may have separate actions. And though a covenant with several persons be joint and several in the terms of it, yet, if the legal interest and cause of action be joint, the action must be brought by all the covenantees; on the other hand, if the interest and cause of action be several, the action may be brought by one only, though the terms of the covenant be joint.⁶ On a joint covenant by two, if one die the survivor only can be sued at law; and if both be dead, the representative only of the survivor.⁷

§ 265. Whether covenants are *dependent* or not is to be collected from the sense and meaning of the parties, and not from any technical words in the instrument; and their precedence depends on the order of time in which the intent of the transaction requires

¹ *Slingsby's case*, 5 Co. 18, b; *James v. Emery*, 8 Taunt. 245; *Quackenboss v. Lansing*, 6 Johns. 49; and per Denman, C. J., in *Hopkinson v. Lee*, 6 Q. B. 964, 970.

² Per Gibbs, J., in *James v. Emery*, *supra*; *Withers v. Bircham*, 3 B. & C. 254. The New York Code of Procedure, § 111, embodies this doctrine, and provides that every action must be prosecuted in the name of the real party in interest.

³ *Duke of Northumberland v. Errington*, 5 T. R. 522.

⁴ *Anderson v. Martindale*, 1 East, 497; *Mansell v. Burredge*, 7 T. R. 852.

⁵ *Southcote v. Hoare*, 8 Taunt. 87; *Sorsbie v. Park*, 12 M. & W. 146.

⁶ *Ludlow v. McCrea*, 1 Wend. 228; *Catlin v. Barnard*, 1 Aik. 9.

⁷ *Rowan v. Woodward*, 2 A. K. Marsh. 140. A joint judgment cannot be sustained against two under-tenants, who may be each of them liable for rent, where it appears that there was no joint occupation of the premises. *Pierce v. Minturn*, 1 Cal. 470.

their performance, and not on the order in which they stand in the deed.¹ When covenants are dependent they are in the nature of conditions, and are precedent each to the other; and this topic will be discussed more fully when conditions are treated of.² And if one only is a condition precedent to the other, its non-performance is not only a defence to the performance of the other, but is ground for action without tender of performance by the latter.³ But where acts are to be done simultaneously, and each is the consideration of the other, the covenants are dependent.⁴

§ 266. Covenants may be *void* when considered with reference to the instrument in which they are contained, or the estate on which they depend. Thus where a deed is void, all the covenants dependent on the interest professed to be conveyed by it are also void.⁵ And a lessee professing to assign over a term which in fact had no existence is not liable, at the suit of a subsequent assignee on a covenant for quiet enjoyment.⁶ The same rule holds where a lease is void for uncertainty; as where one possessed of a term for years granted so much of the term as should be unexpired at the time of his death, and the grantee assigned and covenanted with the assignee for quiet enjoyment, it was held, that the uncertainty annulled the original lease, that the covenant could not subsist without an estate, and, as no estate passed, the assignee could not maintain an action.⁷

§ 267. A covenant to do any thing, which, upon the face of it, appears to be prejudicial to the public interest, or otherwise contrary to law, is void.⁸ If a man covenants not to do a thing which it is lawful for him to do, and a subsequent act of the legislature compels him to do it, the act repeals the covenant; or if he covenants to do a thing, and then a statute is made, which compels him

¹ *Tompkins v. Elliott*, 5 Wend. 496; *Jones v. Barkley*, 2 Doug. 684; *Gardiner v. Corson*, 15 Mass. 504; *Parmele v. Oswego & S. R. R.*, 6 N. Y. 74; *Grant v. Johnson*, 5 *id.* 247.

² See *post*, § 276.

³ *West v. Emmons*, 5 Johns. 179; *Slocum v. Despard*, 8 Wend. 615; *Morris v. Sliter*, 1 Den. 59; *Couch v. Ingersoll*, 2 Pick. 292.

⁴ *Dakin v. Williams*, 11 Wend. 67. Wherever there are mutual agreements of the parties, the thing to be done by the one, being the consideration of the thing to be done by the other, and both are to be performed at the same time, they are dependent, and neither party can recover

against the other, without performance or a tender of performance on his part. *Parker v. Parmele*, 20 Johns. 130; *Johnson v. Wygant*, 11 Wend. 48; *Williams v. Healey*, 3 Den. 363. Mere readiness to perform in such a case is not sufficient, *ib.*

⁵ *Soprani v. Skurro*, Yelv. 18.

⁶ *Noke v. Awder*, Cro. El. 373; s. c. *ib.* 436.

⁷ *Capenhurst v. Capenhurst*, T. Ray. 27; *Waller v. Dean and Chap. of Norwich*, Owen, 136; *Waters v. Same*, 2 Brownl. & G. 158; *Wade v. Merwin*, 11 Pick. 280; *Phelps v. Decker*, 10 Mass. 267.

⁸ *Lowe v. Peers*, 4 Burr. 2225.

not to do it, the covenant is void. But if he covenants to do a thing which is unlawful at the time, and, afterwards, a statute makes it lawful, the covenant is not repealed.¹ Or if he covenants to do a thing which is unlawful by statute, the covenant will not be made lawful by a repeal of the statute, for the covenant was void *ab initio*.²

§ 268. And although a covenant may not be absolutely void or illegal, it may yet be of so hard and oppressive a character, that a court of equity will refuse to enforce it. Thus, a lease of mines contained a covenant, that if the lessor should, at any time before expiration or termination of the lease, give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, or implements, in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein mentioned, it was held to be a covenant so injurious and oppressive to the lessee, that the court ought not to enforce it or grant an injunction to prevent a breach of it.³

§ 269. A covenantor cannot, by any act of his own, short of performance, discharge, or in any manner qualify his express covenant, without the concurrence of the covenantee.⁴ But any positive act of prevention by the covenantee will release the covenantor; as if a man covenants with another to collect his rents in such a town, and then interrupts him;⁵ or if a lessee for years covenants to drain the water out of the land; or to build a house before such a day; and the lessor enters before the day, and holds the lessee out.⁶ The covenant, however, would not be dispensed with, if the covenantee merely forbids the covenantor to proceed with the draining or building.⁷

§ 270. Where the act of one party is the cause why the covenant cannot be performed by the other, performance by the latter is excused, and the thing contracted to be done by the former may be enforced by suit, without averring performance; and proof of such conduct will support the averment of performance.⁸ The omission

¹ *Brick Presb. Ch. v. The Mayor, &c.*, 5 Cow. 538; *Buller*, N. P. 165.

² *Jaques v. Withy*, 1 H. Bl. 65.

³ *Talbot v. Ford*, 18 Sim. 173.

⁴ *Stone v. Dennis*, 8 Porter, 231; *Clancy v. Overman*, 1 Dev. & B. 402.

⁵ *Shaw v. Hurd*, 3 Bibb. 371; *Borden v. Borden*, 5 Mass. 67.

⁶ *Carrel v. Read*, Cro. El. 374.

⁷ *Barker v. Fletwel*, Godb. 69; *Porter v. Stewart*, 2 Aik. 427.

⁸ *Marshall v. Craig*, 1 Bibb. 379; *Couch*

of the covenantee to do some act necessary on his part to the execution of the covenant may also be a ground for excusing the covenantor; as, if a man covenants to convey an estate to another for his life, and the lives of two such other persons as the covenantee should name, and to deliver quiet possession before the Christmas following, the neglect of the covenantee to name the lives is a sufficient excuse for the non-performance of the covenant by the other also.¹ So, where the whole consideration fails, and a stipulation becomes incapable of being substantially performed in the manner intended by the parties, by the voluntary act of either, the other is not bound to proceed, but is at liberty to decline performance on his part.² And if performance of another thing, or at another time, has been accepted in lieu of the thing, or the time stipulated, it is a sufficient excuse for the non-performance of the letter of the contract.³ The voluntary destruction of one of the seals of a deed where the covenants are joint will discharge both covenantors; but if the covenants are several, the breaking of one of the seals will invalidate the instrument so far only as concerns him whose seal is taken off.⁴ But where the seals are torn off by a stranger, or by one with whom the instrument was left for safe-keeping, it does not vitiate the deed, and an action of covenant may still be maintained on it.⁵

SECTION II.

OF CONDITIONS.

§ 271. A *condition* is a qualification annexed to an estate by the grantor, whereby the estate may be enlarged, defeated, or created, upon an uncertain event; and its principles apply to leases, as well as to conveyances in fee. Conditions, according to Littleton, are either *in law* or *in deed*. A condition in deed is that which is expressed in the deed by which it is created; a condition in law is that which arises by necessary implication from the circumstances of the case. This latter doctrine of estates upon condition in law

v. Ingersoll, 2 Pick. 292; *Farnham v. Ross*, 2 Hall, 167.

³ *Warren v. Maims*, 7 Johns. 476.

⁴ *Matthewson's case*, 5 Co. 22, b.

¹ *Twynford v. Buntley*, Freem. 121;

Parker v. Parnele, 20 Johns. 180.

⁵ *Rees v. Overbaugh*, 6 Cow. 746. And see *ante*, p. 16.

² *Kleine v. Catara*, 2 Gallis. 74.

is said by Mr. Chancellor Kent to be of feudal extraction, and to result from the obligations arising out of the feudal relation. There was a tacit condition annexed to every tenancy, that the tenant should not do any act to the prejudice of the reversion. If he committed waste, or did any other act which, in the eye of the law, tended to defeat or divest the estate in reversion, the particular estate was forfeited. Even the rents and services of the feudatory were considered as conditions annexed to his fief; and for the non-payment or non-performance of any of them, the lord might re-enter without a reservation to that effect in the deed creating the estate.¹ A condition has strictly for its object the defeating or avoiding an estate; but where an estate is to be created or enlarged it is technically upon a limitation, the province of which is to mark the period or event for the commencement and the time of duration of the estate whether it be for years, or for life, and therefore relates to the determinable qualities of an estate.

§ 272. Conditions in law are of the nature of *limitations*, by which, upon the happening of a contingency, the estate becomes *ipso facto* terminated. As, if an estate be made to A. for years, if I. S. so long live, this is a limitation by which the estate of A. is terminated immediately upon the death of I. S. Or if an estate be granted to a man and his wife during coverture, they have an estate for life, liable to become extinct upon the dissolution of the coverture; and, upon such a limitation, the next subsequent estate becomes vested immediately upon the determination of the first estate, and the remainder-man may enter.² A condition in a deed, however, is only a *proviso* that grantee shall or shall not do a particular act; the breach of which will not, *ipso facto*, or without entry defeat the estate, but will only give the grantor, his heirs, or assigns, a right to re-enter, and by such entry avoid the estate. Partaking of the nature of the leases to which they are attached, a condition annexed to a term of years may be created by parol, when the lease is so created; but a condition annexed to a freehold lease can only be by deed.³

¹ 4 Kent, Com. 121.

² Co. Lit. 214, b; Mary Partington's case, 10 Co. 41; Shep. Touch. 117.

³ Co. Lit. 214, b. Where an estate is so expressly limited, by the words of its creation, that it cannot endure for any longer time than until the contingency happens upon which the estate is to fail, this is a limitation. On the other hand,

when an estate is expressly granted, upon condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition by entering. And this rule applies to estates for years, even where the condition is that the estate shall be void. See *post*, §§ 288 492 and notes.

§ 273. The principal difference between a condition and a limitation is, that a condition does not defeat the estate when broken, until avoided by the act of the grantor or his heirs; but a limitation marks the period which is to determine the estate, without entry or claim,¹ and no act is necessary to vest the right in him who has the next expectant interest.² Whether the particular form of words made use of amounts to a condition, a limitation, or a covenant merely, is a matter of construction, depending upon the true meaning of the contract. Thus, where a lease contained a clause that, in case of a violation of any of its conditions, the relation of landlord and tenant should, at the option of the landlord, wholly cease, it was held that it did not amount to a conditional limitation, which would absolutely determine the estate by the mere breach of a condition.³ The intention of the party to the instrument, when clearly ascertained, will, of course always control; and conditions and limitations are not to be raised by mere inference or argument. The distinctions on this subject are very subtle and artificial; but the construction of any contract will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in each particular case.⁴

§ 274. Some conditions are *implied* in the relation of landlord and tenant; as, that a tenant shall always have the quiet enjoyment of the premises. Also, that he shall not create a greater estate than he received from the grantor; for, according to the common-law doctrine, if a tenant for life made a feoffment in fee, it produced a forfeiture of his estate.⁵ But this latter relic of feu-

¹ *Stearns v. Godfrey*, 16 Me. 160; 1 Prest. on Estates, 45.

² *Den v. Hance*, 6 Halst. 244; 1 Prest. on Estates, 46.

³ *Beach v. Nixon*, 9 N. Y. 85. And in general where a lease contains a clause, that the landlord may re-enter upon the breach of a condition the lease is not avoided by a breach, but only made voidable at his election; and the estate will continue after breach, unless the landlord exercises his election. *Stuyvesant v. Davis*, 9 Paige, 427; *Arnsby v. Woodward*, 6 B. & C. 519; *Dakin v. Cope*, 2 Russ. 174; *Meni v. Rathbone*, 21 Ind. 454. So though the stipulation is that it shall become void and lessor may re-enter. *Doe v. Birch*, 1 M. & W. 402; *Jones v. Carter*, 15 id. 718; *Hayne v. Cummings*, 16 C. B. x. s. 421; and see *post*, §§ 288, 492, and notes.

⁴ 4 Kent, Com. 182. A covenant to surrender, &c. (on the lessor's paying for the improvements), is not conditional. Words thus parenthetically inserted have never been adjudged a condition; and to make them such, other words defining the meaning, and leaving no doubt of the intention of the parties, must be added. *Tallman v. Coffin*, 4 N. Y. 184; *Jackson v. McClallen*, 8 Cow. 295.

⁵ Co. Lit. 283, b. It was a rule arising out of reasons connected with military tenures, that if the feudal tenant denied that he held the feud of his lord, or did any other act inconsistent with his actual relations to the lord, such denial or inconsistency produced a forfeiture of his whole estate. And this principle applied to leases, as well as to estates in fee. 1 Cruise, Dig. 266, § 40.

dalism has been abolished in most of the States, and would not now, probably, produce so unreasonable a result anywhere; the grantee, in such case, taking the same and no other estate than the grantor himself had.¹

§ 275. Where the condition must be performed before the estate can commence, it is called a *condition precedent*; but where the effect of a condition is either to enlarge or defeat an estate already commenced, it is called a *condition subsequent*. The former avoids the estate, by not permitting it to vest until literally performed; while the non-performance of the latter defeats the estate by divesting the party of his title and the interest already vested; because its continuance is made to depend upon the performance of the act, or the happening of the stipulated contingency. Thus if an estate be limited to A., upon his marriage with B., the marriage is a precedent condition, and until that happens no estate vests in A. Or if a man make a lease of land to I. S. for ten years, provided that if he pays the lessor a certain sum of money on a given day, he shall have the land to him and his heirs, this is also a condition precedent, and must be fulfilled before the estate can take effect. But where a lease is made for years, on condition that the lessee shall pay a sum of money on such a day, or else his estate shall be void, this is a condition subsequent; for here the estate is executed, but the continuance of it depends upon the breach or performance of the condition.²

§ 276. No precise words are required to make a stipulation a condition precedent or subsequent, "and whether it shall be construed as a covenant or a condition does not depend on its position in the deed, but on the period fixed for its performance, and also on the nature of the transaction and the intention of the parties creating the estate. Thus where after the usual covenants by the lessee to pay rent, &c., it was stipulated that he might determine the lease during the term on giving six months' notice *from* and *after* a fixed period, and performance of his covenants; it was held that such performance was a condition precedent to the exercise of his right to determine the lease."³ Lord Kenyon, C. J., observing

¹ DeLancy v. Ganong, 9 N. Y. 9; 1 N. Y. R. S. 738, § 186.

² Wells v. Smith, 2 Edw. 78; Taylor v. Mason, 9 Wheat. 325; Shep. Touch. 17.

³ Hotham v. E. I. Company, 1 T. R. 645; Powers v. Ware, 2 Pick. 461; Good-

win v. Lynn, 4 Wash. C. C. 714; Tompkins v. Elliott, 5 Wend. 496; Gardner v. Corson, 15 Mass. 500; Nicol v. N. Y. & E. R. R. 12 N. Y. 121; Jones v. Barkley, 2 Doug. 684; Parmelee v. Oswego R. R., 6 N. Y. 74; Grant v. Johnson, 5 N. Y. 247; Hopkins v. Young, 11 Mass. 302.

that it had frequently been said, and common sense seemed to justify it, that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words, if there were any to encounter such intention (and there were none in this case), should give way to that intention; and that it was impossible to read this lease without seeing that the parties intended that the tenant should do every thing required of him before he could put an end to the lease.¹ But it is only where covenants go to the whole consideration that they form conditions precedent and where one party covenants to do one thing, the other party doing another, the engagement of the other is no condition precedent,² but the covenants are mutual.³ So a grant of land to a town, to use and improve for ever, and not to be sold, but rented

¹ *Porter v. Shepherd*, 6 T. R. 665. This case was sustained in *Friar v. Grey*, 15 Q. B. 891; s. c. 5 Exch. 584, 597; affirmed finally in the House of Lords, 4 Ho. Lo. Cas. 565; after prolonged discussion. It carries this doctrine of law to an extreme, as the non-performance in any particular of the lessee's covenants entirely defeats his rights under the lease, and it is maintainable only on the ground that a peculiar privilege was granted to him, and so was properly restrained by the condition. A contrary doctrine, at least as respects rights of one party to the contract on the ordinary obligations of the other party, was laid down in *Boone v. Eyre*, 2 W. Bl. 1812; *Carpenter v. Creswell*, 4 Bing. 409, and other cases. Thus, in *Newson v. Smithies*, 8 Hurlst. & N. 840; where lessor was to pay lessee for manure on his delivering up the premises, if in the mean time he had observed "all covenants, &c.," it was held that observance of every one was not a condition precedent to his enforcing the lessor's covenant. Where, however, the obligation of one party is expressly to precede the other's in performance, it forms a condition precedent; as where the lessee covenants to repair the premises, having first been repaired by lessor, *Neale v. Ratcliff*, 15 Q. B. 916; *Hunt v. Bishop*, 8 Exch. 675; *Hutchinson v. Read*, 4 *id.* 761; or where the lessee accepts the demise on consideration of lessor's repairing, *Tidey v. Mallet*, 16 C. B. x. s. 268; *Coward v. Gregory* 36 L. J. 1; *Wright v. Lattin*, 38 Ill. 293. But even here if a concurrent obligation is expressed, though partly to precede the tenant's, it is no condition; as where the lessor covenanted "first to repair and keep in repair." Can-

nock *v.* Jones, 3 Exch. 233; *Dean of Bristol v. Jones*, 1 Ellis & E. 484. And see American cases to the same effect. *Harding v. Kretsinger*, 17 Johns. 298; *Gazley v. Price*, 16 *id.* 267; *Jones v. Gardner*, 10 *id.* 266; *Hopkins v. Young*, 11 Mass. 302; *Gardiner v. Corson*, 15 *id.* 500; *Northrup v. Northrup*, 6 Cow. 296; *Dox v. Day*, 3 Wend. 356; *Lewis v. Weldon*, 3 Rand. 71; *Conn v. Lewis*, 5 Litt. 66; *Alexander v. Mann*, 6 T. B. Monr. 360; *Bank of Columbia v. Hagner*, 1 Pet. 464.

² *Tileston v. Newell*, 13 Mass. 406; *Carpenter v. Creswell*, 3 Bing. 409; *Pepper v. Haight*, 20 Barb. 429; *Bennett v. Pixley*, 7 Johns. 249; *Grant v. Johnson*, 5 N. Y. 247.

³ *Boone v. Eyre*, 2 W. Bl. 1812; *Carpenter v. Creswell*, *supra*; *Doe v. Kennard*, 12 Q. B. 244; where there was a proviso in the lease, that lessee should surrender and lessor might take possession on giving notice, and paying compensation, and it was held that payment of the compensation was no condition precedent. So *Betts v. Perine*, 14 Wend. 219, where A. agreed to labor, and B. and C. agreed during the time to furnish him with a house, and this was held to be an independent covenant. See also *Parsons v. Miller*, 15 Wend. 561; *Dawson v. Dyer*, 5 B. & Ad. 584; *Bartlett v. Greenleaf*, 11 Gray, 98; where the lessee's covenant to pay rent, was held no condition precedent to lessor's covenant for quiet enjoyment. So on a stipulation in a five years' lease for the lessee to have the privilege of five years more provided all improvements were done by him, it was held these might be done during the latter five years. *Palethorp v. Bergner*, 52 Pa. St. 149.

out, and the rents applied to the support of the minister in the town; or a grant for the purpose of building a school-house, for the use of a school, *provided it be built on a certain site*, — is, in either case, on a condition subsequent.¹

§ 277. Conditions precedent, which are to create an estate, will always receive a liberal construction, for the purpose of carrying into effect the intention of the parties; and if the condition is performed as near the intent as possible it will be sufficient; but conditions which are to defeat an estate will be construed strictly.² From the nature of a condition, it is obvious that equity cannot relieve from the forfeiture of an estate, arising upon a condition precedent unperformed. But it is different as to the breach of a condition subsequent, which would work a forfeiture or divest an estate; for there a court of equity, acting upon the principle of compensation, will interpose, and prevent the forfeiture or divestment, provided that satisfactory amends can be made in damages.³

§ 278. The words generally used to make a condition are, *upon condition* or *provided that*; but the words made use of may import both a condition and a covenant. As if, in a lease for years, the words were, *provided always, and it is covenanted and agreed between the parties that the lessee shall not aliene*, there is both a condition by force of the proviso, and a covenant by virtue of the other words.⁴ So if a power of re-entry, for the breach of a covenant, is added to such covenant, it has the force of a condition.⁵ If it is doubtful whether the clause in question is a condition or a covenant, the court will incline to the latter construction; for a covenant is preferable for a tenant. But where a man covenanted and agreed to let his land to another for five years, provided always that the lessee should pay him annually, during the term, a certain sum of money, it was held to be a covenant for the payment of rent, as well as a condition, which might defeat the estate.⁶

§ 279. The word *proviso* in a lease, implies a condition, unless there are subsequent words which change it into a covenant, or a penalty is annexed for non-performance. But where the proviso is, that the lessee shall perform or not perform a thing and no penalty is annexed, it is a condition; upon annexing a penalty, it becomes

¹ *Hayden v. Stoughton*, 5 Pick. 528; *Tyler*, 2 Bro. C. C. 481; *Duffield v. Brigham v. Shattuck*, 10 Pick. 809. *Elwes*, 1 Sim. & S. 289.

² *Ld. Ray*. 835; *Co. Lit.* 220 a.

⁴ *Co. Lit.* 208, b; *Doe v. Watt*, 8 B. & C.

³ *Walker v. Wheeler*, 2 Conn. 299; *Wells v. Smith*, 2 Edw. 78; *Scott v.*

808.

⁵ *Jackson v. McLallen*, 8 Cow. 295.

⁶ *Livingston v. Stickles*, 8 Paige, 898.

a covenant.¹ The words *yielding and rendering* do not amount to a condition, and merely import a covenant to pay rent, unless the landlord would otherwise be without remedy, in case the rent should not be paid.² Mere words in restraint of a grant do not make a condition; as, if the lessor grants *firewood, provided he do not take it of the great trees*, it may be waste, but no cause of re-entry, if he does take of the great trees. Nor will insensible words make a condition; as a lease of forty years to a woman upon condition *if she lives so long and keeps herself such*, without further explanation as to how she is to keep herself, for the intent is uncertain.³

§ 280. A lessor having the *jus disponendi* may annex whatever conditions he pleases to his grant, provided they are not illegal or inconsistent.⁴ But they can only be annexed to an estate at the time of its creation, and may be by a separate deed, distinct from that which creates the estate, provided it is sealed and delivered at the time of executing the principal deed.⁵ If written on the back of a lease, before or at the time such lease is executed, it is valid.⁶ Where the prompt performance of a condition is necessary, to give the grantee the whole benefit designed to be secured to him, or where immediate enjoyment constituted the motive for the contract, the grantee forfeits the estate unless he performs the condition in a reasonable time.⁷ But if no time is limited for the performance of the condition, the grantee has, in general, his whole lifetime for performance.⁸ And if a precedent act is to be performed at a certain time or place, and a strict performance is prevented by the absence of the party who has the right to claim it, the law will not permit him to set up the non-performance of the condition as a

¹ *Jackson v. Allen*, 8 Cow. 221; *Gray v. Blanchard*, 8 Pick. 284; *Simpson v. Titterell*, Cro. El. 242.

² *Delancy v. Ganong*, 9 N. Y. 9.

³ *Com. Dig. Condition (A.)*, 6; 8 Leon. 16; *Hardy v. Seyer*, Cro. El. 414. A covenant to surrender, &c., "on the lessor's paying for the improvements," is not conditional. Words thus parenthetically inserted have never been adjudged a condition; and to make them such, other words, defining the meaning and leaving no doubt of the intention of the parties, must be added. *Tallman v. Coffin*, 4 N. Y. 134; *Jackson v. McClallen*, 8 Cow. 295. A stipulation at the end of a lease, not to make any alterations in the buildings

without the consent of the lessor, is not a condition for the breach of which the lease will be forfeited. *Jackson v. Harrison*, 17 Johns. 66.

⁴ *Lord Cromwell's case*, 2 Co. 69; *Roe v. Galliers*, 2 T. R. 183. A landlord may annex to his lease whatever conditions he pleases, provided they are not contrary to reason or public policy. *Brugman v. Noyes*, 6 Wisc. 1.

⁵ *Griffin v. Stanhope*, Cro. Jac. 456; *Goodright v. Mark*, 4 Maule & S. 80.

⁶ *Ib.*; *Fowell v. Forrest*, 2 Saund. 48; *Shep. Touch.* 126.

⁷ *Hamilton v. Elliott*, 5 S. & R. 884.

⁸ *Per Marshall, C. J., Finlay v. King's Leasee*, 8 Pet. 376.

bar to the responsibility which his part of the contract had imposed on him.¹

§ 281. If a condition subsequent is impossible at the time of its creation, or becomes so afterwards by the act of God, or the law, or of the grantor himself; or is contrary to law, or repugnant to the nature of the estate granted,—it is void, and the estate is absolutely vested in the grantee.² If a condition is in the disjunctive, giving the obligor liberty to do one thing or another, at his election, and one part becomes impossible by the default of the other party, he is not bound to perform the other parts. As if it be to make assurance to A. as he shall devise; or, upon default, to pay five hundred pounds; if A. does not tender an assurance, he need not pay the money. The same principle applies, where one part becomes impossible by the act of God. But if one alternative was impossible at the time of making it, the obligor is still bound to perform the other. Thus, where a lease was made to A. B., with a proviso that if C. should demand any profits of the land, or enter into the same during the lifetime of A. or B. (who were his father and mother), that then the estate limited to C. should cease, and be utterly void, it was resolved that this was a void condition, forasmuch as it was repugnant to the estate limited.³

§ 282. A mere personal disability will not be allowed to excuse the non-performance of a condition; and therefore, where an estate is granted to an infant or *feme covert* on condition, they are bound to strict performance; and, if broken during the minority of the infant, the land is lost for ever.⁴ If it be a condition precedent, which is impossible, the grant is absolutely void, and the estate can never arise.⁵ But as to a condition subsequent, which is never favored in law, its validity will depend upon its being such as the law will allow to divest the estate. And it is to be observed, that a court of equity will never *lend its aid* for the purpose of divesting an estate, for the breach of a condition subsequent; because it tends to destroy estates which it is the policy of the law to uphold. The relief which that court affords, being confined to cases where

¹ Williams v. Bank of U. S., 2 Pet. 102.

² People v. Manning, 8 Cow. 297; McLachlan v. McLachlan, 9 Paige, 584; Holland v. Bouldin, 4 T. B. Monr. 147; Co. Lit. 206, a; Doe v. Carter, 8 T. R. 57; Scovel v. Cabell, Cro. El. 107; Merrill v. Emery, 10 Pick. 507.

³ Com. Dig. Condition (K.), 2; Taylor v. Bullen, 6 Cow. 627; Moore v. Savil, 2 Leon, 182.

⁴ Williams v. Fry, 2 Lev. 21.

⁵ Taylor v. Mason, *supra*; Arnold v. United States, 9 Cranch, 104; Weatherall v. Geering, 12 Ves. 504; Mookley v. Riggs, 19 Johns. 69.

the forfeiture has been the effect of inevitable accident, and the injury produced capable of compensation in a pecuniary point of view.¹

§ 283. In reference to estates which are determinable upon certain conditions, it is to be observed also, that a condition must not be repugnant to the nature of the estate, or to the language of the grant; nor must it be against the policy of the law, as an unwarrantable restraint upon trade, or marriage, or the power of alienation. Neither must it be a stipulation for that which is immoral. Conditions of this latter class are either to do something that is *malum in se* or *malum prohibitum*, or to omit the doing of something that is a duty; or else to encourage such crimes and omissions. Such conditions the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to crime.²

§ 284. It is a general rule also, that a condition, upon a feoffment in fee, not to alien at all is void for repugnancy; for a man cannot dispose of his whole interest in a thing, and yet retain a control over it. But at common law, a grantee may be restrained from assigning for a particular time, or to a particular person; and a condition in a lease that the grant shall become void, if the grantee becomes a bankrupt, has been held valid.³ Yet Chancellor Kent questions whether a restraint of alienation to a particular person, who is named, would be a valid condition at the present day. It is certain, however, that courts now look with great jealousy upon all restraints on the free exercise of that inherent right of alienation, which belongs to all estates in fee. For this reason, a devise of lands to the testator's children, *in case they continued to inhabit the town of Shirley, otherwise not*, was in New York considered to be unreasonable, and repugnant to the nature of the estate, and therefore entirely void.⁴ So, where a lease in perpetuity contained a condition and covenant, that, upon every sale of the premises, the lessee or assigns should obtain the consent in writing of the lessor, and offer him the pre-emptive right to purchase, and if, after such offer, the premises were sold to any other person, one-tenth of the purchase-money should be paid to the lessor; and the lessee made a contract to sell, and agreed to pay the tenth of the sale to the owner of the rent and reversion, the purchaser actually taking pos-

¹ Pullen v. Ready, 2 Atk. 587.

² Mitchell v. Reynolds, 1 P. Wms. 189.

³ Doe v. Carter, 8 T. R. 57; Co. Lit.

228, a; Mary Portington's case, 10 Co. 88, b.

⁴ Newkerk v. Newkerk, 2 Caines, 845.

session under his contract to purchase ; Mr. Chancellor Walworth, without undertaking to decide that the complainant had no remedy at law, either to recover the tenth sales, or to enforce a forfeiture of the lease, held, that the lessor had no remedy in equity ; that such a covenant and condition was a restraint in the nature of a fine upon alienation, inconsistent with the spirit of our institutions, and injurious to the community ; and that a court of chancery would not therefore interfere to enforce the performance of such covenants and conditions, in cases where the landlord, by the terms of his lease, had not, by his contract, secured to himself a legal right, as distinguished from an equitable claim, to enforce a hard bargain for which the law gave him no right of action.¹

§ 285. In another case which previously arose in the Supreme Court of the same State, on a similar covenant in a lease, to a man his heirs and assigns for ever, paying a certain rent, and that in case the lessee should sell, he would first offer it to the lessor, and if the lessor should not purchase, he would pay him one-tenth of the purchase-money, and if the lessee did not keep and perform all the conditions, the estate should cease, and the lease become void ; it was held that the condition was a lawful and valid condition, and that the nature of the estate created by such lease was a fee-simple conditional, or a fee-simple subject to be defeated upon a condition subsequent, by the failure or non-performance of which an estate already vested might be defeated. It was also said, in this case, that if the condition had been general *not to alien*, it would have been necessarily repugnant, and therefore void ; but that being a grant coupled with the condition, that if the tenth of the proceeds of sale was not paid to the lessor, the estate should be defeated, the lease would be forfeited upon a breach of such condition, and the lessor might re-enter.² But the Court of Appeals has since decided, that the reservation in a lease in fee, of a pre-emptive right of purchase by the grantor and his heirs, in case of a sale by the grantee, his heirs or assigns, and the reservation by the grantor of a right to a portion of the sale-money on each sale by the grantee, are void, as repugnant to the estate granted, and as placing an illegal restraint upon the power of alienation.³

¹ *Livingston v. Stickles*, 8 Paige, 398.

² *Jackson v. Schutz*, 18 Johns. 174.

³ *Depeyster v. Michael*, 6 N. Y. 467. This case was that of a lease of lands in fee, where the lessor, in addition to an

annual rent, reserved to himself, his heirs and assigns, the right to purchase the premises in case the lessee, his heirs or assigns, should choose to sell, on paying three-quarters of the price demanded, the

§ 286. If the condition is, that the lessee will not do any particular act without leave from his lessor, when leave is once granted, the condition is gone for ever; for a condition is to be taken strictly, and by one license it is satisfied. But the license must be such as is required by the lease; and, therefore where the lease required the license to be in writing, a parol license was held to be insufficient;¹ yet if such parol license be used as a snare under circumstances which amount to fraud, equity will give relief.²

§ 287. The forfeiture of a lease by breach of any other condition may, however, be waived in like manner as a forfeiture for non-payment of rent, or a notice to quit; for if the landlord does any act, with knowledge of the breach, which can be considered as an acknowledgment of a tenancy still subsisting, he waives the forfeiture; and if the condition impose a single obligation, and must be wholly taken if at all, the condition itself is discharged as much as by a license.³ We shall have occasion, however, to treat of this

lessee covenanting to make the first offer to the lessor, his heirs or assigns, upon those terms; and in case the offer should be declined, then the lessor reserved to himself, his heirs and assigns, one-fourth part of all moneys which should arise from the selling, renting, or disposing of the lands by the lessee, his heirs or assigns, when and as often as the same should be sold, rented, or disposed of; with the condition, that, in case of a sale or other transfer without the payment of such one-fourth to the lessor, his heirs or assigns, the sale or transfer should be void, and the premises should revert to the lessor, his heirs and assigns, who might then re-enter upon the premises, and re-possess, and enjoy the same as of his former estate. It seems from this case, that, during the New York colonial government, the English statute of *quia emptores* was not regarded as in force. The object of that statute was to support military tenures, by securing to the chief lords of fees, their escheats, wardships, &c., and by transferring the tenure of lands from the *mesne* to the *chief lords*, the statute entirely devastated the former of any reversion whereby, on a forfeiture, the estate might revert to him. It was competent, therefore, for our citizens unrestrained by such a law, and under the principles of feudal tenures, admitting of such reversion, to convey lands in fee, to be holden directly of them and their heirs; and such grantors, being entitled to the reversion or escheat on failure of the issue of the grantee, could lawfully annex conditions

to the power of alienation. But the acts of 22 October, 1779 (1 Jones & Var. 44), transferring the seignior of all lands, escheats, &c., from the king to the people of this State, and the act of 20 February, 1787, concerning tenures (1 R. L. 70), put an end to all feudal tenures between one citizen and another, and substituted in their place a tenure between each landholder and the people in their sovereign capacity, and thus removed the entire foundation on which the right of the grantor to restrain alienation formerly rested. Those statutes are in their terms restrictive, and since their passage all restraints upon alienation, contained in conveyances in fee, whether executed prior or subsequent to the date of those acts, are held to be void. But though this decision has not been qualified in the particular point decided, it has yet since been held that the statute of *quia emptores* was in force in New York before the statutes of 1779 and 1787, and also that the reservation of rent creates sufficient privity, notwithstanding the statute to enable the lessor's assigns to bring covenant or ejectment against the lessee and his assigns for the rent reserved. *Van Rensselaer v. Hays*, 19 N. Y. 68; *Same v. Ball*, *ib.* 100; and see *ante*, § 261, and notes.

¹ *Roe v. Harrison*, 2 T. R. 425; *Seers v. Hind*, 1 Ves. 294.

² *Richardson v. Evans*, 3 Madd. 218; *Macher v. Found. Hosp.* 1 Ves. & B. 191; *Roe v. Harrison*, 2 T. R. 425.

³ 1 Smith's Lead. Ca. 20 a; *Lloyd v.*

matter more fully, when we come to consider the subject of terminating a lease by forfeiture, and shall not, therefore, pursue it any further at present.

§ 288. In general, where an estate is defeasible, on the non-performance of a condition subsequent, it is not absolutely defeated upon the happening of the contingency on which it is defeasible; the estate will continue afterwards, unless the grantor or his heirs take advantage of the breach of condition, by an actual entry, which is generally necessary to revest an estate of freehold;¹ unless grantor is already in possession.² A different rule formerly prevailed with regard to a term for years, and it was considered that as a breach of condition the lease absolutely determined, and could not be set up again by any act, even on the part of the landlord. But this doctrine is no longer recognized.³

§ 289. The substantial performance of a condition is sufficient; and its non-performance may be excused, when occasioned by the act of the law, or of the other party. In general, also, if a condition becomes impossible by the act of God, the obligation is discharged. As where the obligee in a condition subsequent died; or a man covenanted to build a house before such a day, and afterwards the plague came there before that day, and continued there until after the day, the condition was held to be dispensed with.⁴ So where the law forbids the act conditioned to be performed it is excused.⁵ The same result follows, where the party accepts another thing in satisfaction, or is himself in default; as where the condition is the payment of a sum of money, and the payee is himself out of the commonwealth;⁶ or the obligation is to build or repair a house, and the obligee disturbs or forbids the performance.

Crispe, 5 Taunt. 249; McGlynn v. Moore, 25 Cal. 384.

¹ Canal Co. v. Railroad Co., 4 Gill & J. 121; Willard v. Henry, 2 N. H. 120; Chalker v. Chalker, 1 Conn. 79; Dumper's case, 4 Co. 119, b; Bleecker v. Smith, 13 Wend. 530; Dakin v. Williams, 17 Wend. 447; s. c. 22 id. 201. "The profession have always wondered at Dumper's case," said Sir J. Mansfield, in Doe v. Bliss, 4 Taunt. 735; "but it has been law so many centuries, that we cannot now reverse it." So per Ld. Eldon, in Bummel v. Macpherson, 14 Ves. 178; and Nelson, J., in Dakin v. Williams, *supra*. It has, however, been recognized and followed in Lynde v. Hough, 27 Barb. 415, 422; Siefke v. Kock, 31 How. Pr. 888; McKildoe v. Darracott, 13 Gratt. 278;

Dougherty v. Matthews, 35 Mo. 520. See Chipman v. Emeric, 5 Cal. 49. The doctrine, of course, applies only to negative covenants, for a license is a permission to do a prohibited act, not to omit an affirmative duty. But it makes no difference whether the condition relates to a single or continuous duty. A license for one breach in the manner contemplated by the lease will discharge the whole condition.

² Lincoln Bank v. Drummond, 5 Mass. 321; Rollins v. Riley, 44 N. H. 9.

³ See *post*, §§ 412, 492, and notes.

⁴ Merrill v. Emery, 10 Pick. 507; 1 Rol. Abr. 450.

⁵ Holland v. Bouldin, 4 T. B. Monr. 150.

⁶ Williams v. Bank U. S., 2 Pet. 102; U. S. v. Arredondo, 6 id. 745; Bradstreet v. Clark, 21 Pick. 389.

But where the lessee covenanted to drain the water upon the land before such a day, and after the lessor entered before the day, and continued there until the day was past, it was held to be no excuse unless the lessor disturbed him in his operations.¹

§ 290. In every well-drawn lease it is the invariable practice to insert a clause of re-entry for a breach of its covenants or conditions. This practice is said to have grown out of an ancient process for the recovery of rent by writ of *cessavit*, which in fact amounted to a distress of the whole of the tenant's land, by seizing and holding it until he paid the arrearage of rent. For, by the feudal law, after the lord had granted out his lands, he still had the right of seignior, as well as the right to all the other services reserved upon the grant; and in case of a failure in any of them, he might enter upon and take possession of the feud. This proceeding, however, was taken away by the statute of 52 Hen. III., which prohibited a distress of the freehold, except by the King's writ, and left the tenant's chattels, as the only subject for the lord's distress. After which, and as a convenient substitute therefor, the practice was introduced, of inserting a power of re-entry, for the non-payment of rent, on granting a lease; which gradually extended itself to other covenants and causes of forfeiture besides the non-payment of rent.²

§ 291. This clause enables the lessor, his heirs or assigns, in case of a breach of *condition* or *covenant*, to re-enter upon the demised premises, and eject the tenant, leaving both parties in the same situation as if the lease had never been granted.³ The grantor and his heirs, however, may still enter and take advantage of a breach of *condition*, or other common-law forfeiture, by ejectment, without this clause.⁴ But in a case of a breach of *covenant*, in the absence of a proviso for re-entry, the lessor would possess no such power; the mere breach of a covenant, enabling him to sue for

¹ *Carrel v. Read*, Cro. El. 374; *Jackson v. Crafts*, 18 Johns. 110.

² Hargrave's note to Co. Lit. 142, a. The right of re-entry is not a reversionary or other estate in the land, but is a mere right of action, and if enforced, the grantor of the estate would be in by the forfeiture of the condition, and not by a reverter. At common law, this right of action could not be granted over, and it is only by force of the statute that the assignee of the lessor can now re-enter for condition broken. But the statute did not

intend to convert this right into a reversionary estate, as has been sometimes supposed.

³ *Johns v. Whitley*, 8 Wils. 127; *Doe v. Phillips*, 2 Bing. 13. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reversed by deed; and all the conditions or stipulations annexed thereto, must be strictly followed. *Smith v. Blaisdell*, 17 Vt. 199.

⁴ *Wigg v. Wigg*, 1 Atk. 382; *Doe v. Watt*, 1 Mann. & R. 694.

damages only.¹ Any mere covenant without the clause authorizing a re-entry would afford but an indifferent security to the landlord, from the difficulty of ascertaining the actual extent of damage done, by a breach of many of the covenants; or the inability of a tenant to pay the pecuniary recompense therefor, after it shall have been recovered in a suit at law. The principle applies also to the case of a tenant, holding under a mere agreement for a lease, which specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them.²

§ 292. But a proviso for re-entry operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease of *ninety-nine years if A. and B. should so long live*, was granted with a proviso for re-entry, in case the lessee should underlet the premises for the purposes of tillage, and an under-tenant of the lessee ploughed up and sowed the land, but the lessor did not enter during the continuance of the estate; it was held in an action of trespass by the lessor against the under-tenant, for entering upon the land after the determination of the estate, for the purpose of carrying away the emblements, that the plaintiff, having never been in possession by right of re-entry, for condition broken, could have no advantage thereof, and that the defendant who ploughed and sowed the land, was entitled to take the emblements.³

§ 293. A power of re-entry, like a condition, can only be reserved to the lessor and his heirs, and not to a stranger, even by express words; as where a lease was made by a trustee, reserving a right of re-entry upon a breach of covenant to the *cestui que trust*; forasmuch as the legal estate was in the trustee, the reservation was held to be void.⁴ For a similar reason, this power is not available by the executor of one who has granted land in fee subject to

¹ *Pells v. Brown*, Cro. Jac. 590; *Page v. Hayward*, 11 Mod. 61, Per Holt, C. J.; *Wigg v. Wigg*, 1 Atk. 383, Per Ld. Ch. Hardwicke; 2 Bl. Com. 155; *Brown v. Kite*, 2 Overt. 233; *Den v. Post*, 1 Dutch. 285; *Fox v. Brissac*, 15 Cal. 223. A proviso for re-entry in a lease is to receive a reasonable construction like other contracts, and is not to be construed with the strictness of conditions at law. *Doe v. Elsam*, 1 Mood. & M. 189.

² *Doe v. Breach*, 6 Esp. 106; *Doe v. Watt*, 8 B. & C. 308; *Doe v. Kneller*, 4 C. & P. 3.

³ *Johns v. Whitley*, 3 Wils. 65. A

right of re-entry may be effectually given upon breach of covenants, including a covenant to pay rent, as well as in terms for non-payment of rent; and though a general clause of re-entry can extend only to cases not otherwise specially provided for, yet such a general clause is compatible with a prior clause giving a right of re-entry, also after a certain period of default in the rent. *Van Rensselaer v. Jewett*, 2 N. Y. 141.

⁴ *King's Chapel v. Pelham*, 9 Mass. 501; *Doe v. Lawrence*, 4 Taunt. 23; *Jackson v. Topping*, 1 Wend. 388.

an annual rent; for as executor, he could not be vested with the estate. It would be otherwise, however, if the testator held an estate for years in the premises, and had leased for part of the term, since the residuary estate in that case would belong to the executor.¹ And a power to a particular person to enter, will not extend to his executor, unless so mentioned.² But a residuary devisee, may take advantage of such a condition, annexed to a specific devise, if the deviser do not otherwise limit over the contingent interest in the estate thus specifically devised.³ And so, may an assignee of the reversion, as we shall presently see, by force of the statute of Hen. VIII; yet as a general rule, when no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs of the lessor.⁴

§ 294. To enable a reversioner to avail himself of a forfeiture, upon a condition broken, it is necessary, according to the English cases, that he should have the same estate in the lands at the time of the breach that existed when the condition was created; for an extinguishment of the estate in reversion, in respect of which the condition was made, will extinguish the condition also.⁵ As where a lease was made for a hundred years, and the lessee made an under-lease for twenty years, rendering rent, with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term, it was held that the grantee should not have either the rent or the power of re-entry; for the reversion of the term to which they were incident was extinguished in the reversion in fee.⁶ It is not, however, necessary, that the party claiming should have an actual reversion, remaining in the land after the grant; for if a lessee for years assign his whole term to another upon condition, he may still

¹ *Van Rensselaer v. Hayes*, 5 Den. 477.

² *Hassel v. Gowthwaite*, Willes, 500.

A right of re-entry for the non-payment of rent may be reserved upon a conveyance in fee; and is assignable with the rent. *Van Rensselaer v. Ball*, 19 N. Y. 100.

³ *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 *id.* 306; *Clapp v. Stoughton*, *ib.* 463; *Austin v. Cambridgeport*, 21 Pick. 215. In New York, the right of a devisee to take advantage of a condition reserved in a grant in fee by his deviser, seems established both by statute and by common law. See cases cited, *post*, § 295, note; but the court do not limit the doctrine to devisees, but apply it to all assignees. In *McKissick v. Pickle*, 16 Pa. St.

140, the court seems to consider the old law restricting the reservation of conditions to, and enforcement of them by the grantor's heirs alone, to be obsolete, and that an assignee may take advantage of any condition so reserved. Neither the executor, nor a devisee of one who has granted land in fee subject to rent, can maintain ejectment for rent in arrear which became payable in the lifetime of the testator, but only for such as accrued since the will took effect in his favor. *Van Rensselaer v. Hayes*, *supra*.

⁴ Co. Lit. 214, a; 8 Atk. 134.

⁵ *Dumpro's case*, 4 Co. 119, b.

⁶ *Thre'r v. Barton*, Moore, 94; *Webb v. Russell*, 8 T. R. 393.

re-enter for breach of the condition, though he has parted with his whole term.¹ Yet a third person cannot enter, unless he come in under the lessor; therefore, if a lessee for twenty years make a lease for ten on condition, and then surrender to him in reversion, the reversioner, being in of a paramount estate, cannot take advantage of the condition.²

§ 295. At common law, an assignee or grantee of a reversion, although he might have an action for rent reserved, could not enter for a condition broken; for, to prevent maintenance, an assignment of a mere right of entry was not allowed. The statute 32 Hen. VIII. c. 34, first provided that *assignees* or *grantees* of a reversion should be entitled to all such advantages as the lessors or grantors themselves had, by entry for non-payment of rent, or other forfeiture. This statute has been generally re-enacted in the United States,³ and the Revised Statutes of New York have extended the provisions of the English statute by enacting, "The grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies by *entry*, action, distress, or otherwise, for the non-performance of any agreement contained in the lease so assigned, &c., as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor. The provisions of this section extend as well to grants or leases in fee reserving rent, as to leases for life and for years."⁴ Upon the construction of this statute, the Court of Appeals in New York held that the grantee of a rent reserved in fee, was entitled to all the remedies which his grantor had, before he parted with the reversion; and that a right of re-entry for the non-payment of rent may be reserved upon such a conveyance, and that such a right is not confined to the grantor and his heirs, but is assignable, with the rent by force of the statute.⁵

¹ Doe v. Bateman, 2 B. & A. 168. This case was affirmed in Colville v. Hall, 14 Ir. Com. L. 265; and see post, § 295, and note.

² Chaworth v. Phillips, Moore, 876.

³ But not in Ohio, Crawford v. Chapman, 17 Ohio, 449.

⁴ R. S. 748, §§ 23, 25; Laws of 1806, c. 98.

⁵ Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Ball, *ib.* 100. It was also declared in these cases that the assignee of a lessor in fee might have covenant and ejectment at common law,

although having no reversion, since the privity which this conferred, was replaced by the privity flowing from the rent as an incorporeal hereditament. The Statute 1806, c. 98, was repealed by Statute 1860, c. 896; but the same right of action was decided to exist under Statute 1846, c. 274. Van Rensselaer v. Slingerland, 26 N. Y. 580; and at common law; Same v. Denison, 35 *id.* 393; where the operation of the Statute of 1787 was declared to be restricted to covenants in law; and so see

§ 296. It is to be observed, however, that an assignee of part of the reversion is not within the statute; as if a lease be made of three acres of land with a condition for re-entry, the assignee of the reversion of two acres shall not enter for a breach of the condition; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed.¹ Yet, although the assignee of the reversion of part of the land cannot enter for a condition broken, he may maintain an action of covenant by virtue of the statute.²

§ 297. Where a landlord has a right of re-entry for non-payment of rent, a demand of the rent, either upon or after the last day which the lessee has to pay, is still essential to complete the forfeiture, and enable him to maintain an action; for it is not until demand and non-payment that this condition is broken.³ But there may, by the special agreement of parties, be a re-entry for default in payment of rent, without a demand of it.⁴ In such case, the mere failure to pay with or without demand constitutes the breach, and a subsequent entry at any time is good.⁵ So if the tenant disclaims holding under the landlord, or refuses to pay rent on that ground, the lessor is entitled to re-enter without any previous demand of rent.⁶ An actual demand is, in general, necessary to complete the breach, whether the proviso gives the right of re-entry, in case the rent be behind for a certain period of time after the day whereon it falls due, or the lease is declared to be absolutely void in case of its non-payment.⁷ Accordingly, where the

Tyler v. Heidorn, 46 Barb. 489. The actions in all these cases were by devisees, to whom such conditions were held to pass by *Hayden v. Stoughton*, 5 Pick. 528, and *ante*, § 298, and note 3; but the court do not distinguish between these and any class of assignees, nor on principle can any distinction be made at law. In *Van Rensselaer v. Barringer*, 89 N. Y. 9; *Hosford v. Ballard*, *ib.* 147, the law is declared settled beyond question. In the very learned and elaborate opinion of Judge Denio, he states at length the origin and history of the several enactments, both in England and this country, in favor of assignees of reversions; and shows most conclusively that not only were the grantees of a perpetual rent charge enabled thereby to maintain an action on the covenants for the payment of rent, but that the assignees of a grantor in fee reserving such a rent have precisely the same remedy by entry for its non-payment, which

the grantor himself had before he parted with the right.

¹ Co. Lit. 215, a; *Dumpor's case*, 4 Co. 119, b; *Knight's case*, 5 *id.* 55, b; *Lee v. Arnold*, 4 Leon. 27.

² *Twynam v. Pickard*, 2 B. & A. 105.

³ *Doe v. Wandlass*, 7 T. R. 117. We have elsewhere, *post*, § 498, seen the strict requisites of the demand, when the landlord proceeds to enforce a forfeiture under the common law, and independent of the statute.

⁴ *Dormer's case*, 5 Co. 89. So *Fifty Associates v. Howland*, 5 Cush. 214, where stipulation that lessor might enter without further demand, was held to mean without any demand.

⁵ *Goodright v. Cator*, 2 Dougl. 478; *Doe v. Masters*, 2 B. & C. 490.

⁶ *Jackson v. Collins*, 11 Johns. 1; *Salem Presb. Cong. v. Williams*, 9 Wend. 147.

⁷ Co. Lit. 202, a; *Clun's case*, 10 Co. 129; *Doe v. Wandlass*, *supra*.

condition was, that if the rent were suffered to be due and unpaid, *the indenture, and the estate thereby created, should be void*, it was held that the grantor should not be entitled to recover as for condition broken, without showing a formal demand of the precise sum due, at a convenient time before sundown of the day on which the rent became payable by the reservation.¹

§ 298. Wherever the action of ejectment is in force, no actual entry by the landlord to take advantage of condition broken, is necessary, because the constructive entry implied and confessed in the action is sufficient for the purpose even where the estate to be avoided is one of freehold.² But the necessity of proving a strict common-law demand, both as to time and place, still remains, wherever a forfeiture for non-payment of rent is to be established, unless when dispensed with by agreement of the parties, or by statute.³ Thus, for instance, where under a proviso for re-entry, in case of the non-payment of rent for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the twenty-first day, at one o'clock; it was held that only one quarter's rent should have been demanded, and that at sunset, if the lessor insisted upon the forfeiture.⁴ Under a proviso for re-entry, if no sufficient distress is upon the premises at the expiration of fourteen days from the rent-day, the landlord is *prima facie* entitled to recover, by proof of there being no distress on some day after the fourteen, though that day be subsequent to the demise in the ejectment;⁵ and this clause must be strictly pursued, for every part of the premises must be searched, in order to ascertain that no sufficient distress can be found thereon.⁶ But a lessor can in no case bring an ejectment upon the clause of re-entry, after distraining for rent in arrear, this being considered a waiver of the forfeiture.⁷

§ 299. The Revised Statutes of New York dispense with all the formalities of a common-law demand, and provide that, in case of the non-payment of rent, and no sufficient distress is to be found upon the premises, an action of ejectment may be brought as a

¹ Jackson v. Kipp, 3 Wend. 280. As to the requisites of a common-law demand of rent. See post, § 498.

² Doe v. Masters, *supra*; Little v. Heaton, 2 Ld. Ray. 760; Bear v. Whistler, 7 Watts, 149; Jackson v. Chrysler, 1 Johns. Cas. 125; Doe v. Alexander, 2 Maule & S. 525; Garrett v. Scouten, 3 Den. 334.

³ McCormick v. Connell, 6 S. & R. 151; Van Rensselaer v. Jewett, 2 N. Y. 147.

⁴ Doe v. Paul, 3 C. & P. 618.

⁵ Doe v. Fuchau, 15 East, 286.

⁶ Rees v. King, Forrest, 19.

⁷ Norton v. Sheldon, 5 Cow. 448.

substitute for the formal demand and re-entry at common law. This provision of the statute is taken from that of 4 Geo. II. c. 28, and has been followed in many of the States. It provides, "Wherever any half-year's rent, or more, shall be in arrear from any tenant to his landlord, and no sufficient distress can be found on the premises to satisfy the rent due, if the landlord has a subsisting right by law to re-enter for the non-payment of such rent, he may bring an action of ejectment for the recovery of the possession of the demised premises; and the service of the declaration therein shall be deemed and stand instead of a demand of the rent in arrear, and of a re-entry on the demised premises."¹

§ 300. This statute does not extend to cases where the lease contains no clause of re-entry;² nor where there is a sufficient distress upon the premises; and, consequently, in such cases the lessor must proceed as before the statute.³ The distress, however, must be such that the landlord could have availed himself of it; and, therefore, where the tenant locked up the premises, so that his goods, supposing there was sufficient there, could not be distrained without rendering the landlord a trespasser, Lord Tenterden held that proof of this was sufficient to satisfy the statute; which meant no sufficient distress upon the premises which could be got at.⁴ When proceeding under that statute, also, he was bound to show a compliance with all the requirements of the common law, before he could avail himself of a condition of re-entry.⁵ And under the English statute it has also been held, that this provision has not done away with the necessity of a demand of rent, if the lease requires it, although such demand need not be made with all the particularity required at common law.⁶

§ 301. But a recent statute of New York, which abolishes distress for rent, now authorizes a re-entry for non-payment of rent, whether there are sufficient goods on the premises or not, in all cases where the right of re-entry has been reserved in the lease. It provides, that whenever a right of re-entry is reserved and given to a grantor or lessor, in any grant or lease, in default of a sufficiency of goods and chattels whereon to distrain, for the satisfaction of any rent due, such re-entry may be made at any time after

¹ 2 R. S. 505, § 30.

² *Jackson v. Hogeboom*, 11 Johns. 163.

³ *Doe v. Wandlass*, 7 T. R. 117; *Doe v. Roe*, 9 Dowl. 548.

⁴ *Doe v. Dyson*, Mood. & M. 77.

⁵ *Jackson v. Kipp*, 3 Wend. 280; *Jackson v. Wykoff*, 5 Wend. 53; *Coon v. Brickett*, 2 N. H. 163; *Hamilton v. Elliott*, 5 S. & R. 375; *Gray v. Blanchard*, 8 Pick. 284.

⁶ *Doe v. Shawcross*, 3 B. & C. 752.

default in the payment of such rent; provided fifteen days' previous notice of such intention to re-enter, in writing, be given by such grantor or lessor, or his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators, or assigns, notwithstanding there may be a sufficiency of goods and chattels on the lands granted or demised, for the satisfaction thereof. And the notice may be served personally on such grantee or lessee, or by leaving it at his dwelling-house on the premises.¹ This statute provides an additional mode of re-entry, by substituting a fifteen days' notice of the landlord's intention to re-enter, in lieu of showing that there was no sufficient distress on the premises. It applies the remedy of ejectment, to a class of cases, to which it did not apply before, authorizing the re-entry of the landlord upon premises where there is a sufficient distress, provided a notice of such intention, in writing, is served on the tenant fifteen days before the suit is commenced. This new remedy is not incompatible with the former one, which required the landlord to prove the absence of a sufficient distress; both remedies may subsist together, and the landlord be left to elect between them.²

§ 302. The clause of re-entry for non-payment of rent operates only as a security for rent; for, at any time before judgment is entered in the cause, the tenant may either tender to the landlord, or bring into the court where the suit shall be pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the landlord; and, in such case, all further proceedings in the cause shall cease. And even in case the landlord recovers possession of the premises, the tenant may, at any time within six months after judgment and execution thereon, make such payment or tender to the landlord, and become thereby entitled to a restoration of the premises, according to the terms of the original lease. If the landlord, during the six months, shall have been in possession of the premises, the court may direct that so much and no more as he shall have made of the premises, during his possession thereof, or as he might, without wilful neglect, have made of the same, be deducted from the amount of rent in arrear, with the cost of the ejectment; and the tenant will be

¹ Laws of 1846, c. 869. The constitutionality of this law was sustained in *Van Rensselaer v. Snyder*, 13 N. Y. 299.

² *Williams v. Potter*, 2 Barb. 316. Though the common-law mode of re-entry

is not taken away by this statute, an entry pursuant to its provision does not require the formalities, as to demand, of a common-law entry. *Van Rensselaer v. Snyder*, *supra*.

required to pay only the balance before he shall be restored to the premises.¹

§ 303. A mortgagee of such lease, who is not in possession, who shall within the said six months pay the rent in arrear, with costs, and perform the agreements which ought to be performed by the first lessee, will not be affected by such recovery in ejectment. And a lessee, or any person claiming any interest in such lease, may also within that time file a bill in equity for relief; and, if such relief be granted, he will be let in upon the terms of the original demise.² But in order to relieve the landlord from the inconvenience of continuing always liable to an uncertainty of possession, from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity, the next section of the statute bars the tenant from claiming relief after six months shall have elapsed from such judgment and execution. When a landlord enters for a condition broken, he avoids all charges and encumbrances put upon the land by the tenant after the condition made; for he is then seized as of his first estate, and must have it in the same plight it was when he parted with it.³

¹ 2 R. S. 505, §§ 81-88.

² *Ib.* §§ 81-89; *Doe v. Roe*, 8 Taunt. 402.

³ *Shep. Touch.* 121.

CHAPTER VIII.

COVENANTS ON THE PART OF THE LESSOR.

SECTION I.

THE COVENANT FOR QUIET ENJOYMENT.

§ 304. THE principal covenant on the part of a landlord is, that his tenant shall have *the quiet enjoyment and possession of the premises* during the continuance of the term. The law supposes that when a man makes a lease, he has a good title to the land, and, consequently, power to lease it; and an engagement to this effect on the part of every lessor is implied; and therefore also, and as a condition of his receiving rent, that the lessee shall not be disturbed in his possession of the demised premises during the term by the lessor or by a paramount title.¹ But although this covenant is always implied on the part of a lessor in every case of a tenancy for a fixed period, however short it may be,² it is still usual to insert, among the other provisions of the lease, an express covenant, for the lessee's quiet enjoyment, and to save him harmless from all persons claiming title, upon his performance of those stipulations which are obligatory upon him.³

¹ *Holder v. Taylor*, Hob. 12; *Ludwell v. Newman*, 6 T. R. 458; *Baugh v. Wilkins*, 16 Md. 35; and see *Burwell v. Jackson*, 9 N. Y. 585; and *ante*, § 252, and notes.

² Per Parke, B., in *Hart v. Windsor*, 12 M. & W. 85, on the part of a lessor. Want of title may amount to a fraudulent representation, and when accompanied with damage will constitute a good cause of action, irrespective of this covenant. *Whitney v. Allaire*, 4 Den. 554; s. c. 1 N. Y. 805. In this case, the defendant was induced to hire a wharf from the plaintiff by fraudulent representations that the right mentioned in the lease embraced a parcel of land

which in fact belonged to the corporation of New York: it was held, in an action for rent, that he was entitled to a deduction of the sum which he was obliged in good faith to pay for a lease of that lot. The fact that the demise was not of the wharf, but of plaintiff's right to the wharf, made no difference. The question in such cases is, not what passed by the conveyance, but what would have passed, had the representations been true.

³ The Supreme Court of New York, in the case of *Kinney v. Watts*, 14 Wend. 88, held that, under the statutes of that State, no covenant for quiet enjoyment could be implied in a lease, or other conveyance of

§ 305. This covenant, whether expressed or implied, only means that the tenant shall not be evicted, or disturbed by persons deriving title from the lessor, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers. All that it requires is, that the lessor shall have such a title at the time as shall enable him to give a good unencumbered lease for the term demised.¹ But any interference with the possession of the lessee, more than a mere trespass, by the lessor himself, will amount to a breach of the covenant in whatever form it may happen.² If the lessor merely covenants against the acts of a particular person, his general obligation is restricted, and a molestation by that person only can be the ground of a breach of the covenant.³ If it is contained in a lease for life, the lessor is bound, under the general covenant, to make it good against all men; but if it be a lease for years, then only as against all persons claiming through himself, or those from whom he claims title. But if the tenant is ousted by one who has no title, in the language of the law, by a stranger, it is only a trespass, and the law leaves him to his remedy against the wrong-doer, as it arises from no fault of the landlord.⁴

§ 306. While the covenant for title implied from the words "demise," &c., extends to title, and so may be broken wherever a covenant for seisin, or right to convey, or even a covenant against encumbrances would be,⁵ the implied covenant for quiet enjoyment from the same words extends like the express to possession alone, and is broken only by entry, expulsion, or actual disturbance of possession by the lessor, or by one holding a paramount title, or by their withholding possession. Thus where the breach assigned was, that the plaintiff was evicted in consequence of a judgment in

terms for years where the term exceeded three years; but the Court of Appeals overruled this case, in *The Mayor, v. Mabie*, 18 N. Y. 151, and held that such an instrument is not a conveyance of real estate, within the meaning of the statute (1 R. S. 788, § 140) forbidding the implication of covenants in deeds. And see *Vernam v. Smith*, 15 N. Y. 332. But a lease in perpetuity, or in fee reserving rent, is a conveyance of real estate, within the provisions of the statute in regard to the implication of covenants, and if it contains no covenant for quiet enjoyment, none will be implied. *Carter v. Burr*, 39 Barb. 59.

¹ *Gardner v. Keteltas*, 3 Hill, 330.

² *The Mayor v. Mabie*, *supra*. A

covenant of seisin which resembles a lessor's implied covenant for title extends to the whole of the premises granted, and includes every thing which is parcel of the realty, and which would pass by the deed if it belonged to the grantor; and, in such case, if a fence on the premises does not belong to him, the covenant is broken. *Mott v. Palmer*, 1 N. Y. 564.

³ *Gardner v. Keteltas*, *supra*; *Howell v. Richards*, 11 East, 642.

⁴ *Iggulden v. May*, 9 Ves. 330; *Dudley v. Folliott*, 3 T. R. 534; *Andrews' case*, Cro. El. 214; *Greenby v. Wilcocks*, 2 Johns. 1; *Ellis v. Welch*, 6 Mass. 246.

⁵ *Miller v. Thornton*, 1 Duv. 369.

ejectment, by one Yates, having lawful title to the premises; it was held a good objection on demurrer, that it did not appear that Yates's title commenced by any act of the defendant's, prior to the assignment made by them to the plaintiff, who might, therefore, have been evicted by means of some act done by himself, since the assignment.¹ The intendment, that the title of the party evicting was derived from the plaintiff, may be precluded by averring that the person evicting entered by lawful title, which accrued to him before the date of the conveyance to the plaintiff,² or that the party evicting entered by virtue of a title theretofore made by, from, and under the defendant.³

§ 307. A covenant for quiet enjoyment against "*any interruption of, from, or by the grantor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim, any estate, &c., in the premises, by, from, under, or in trust for him or them, or by, through, or with his or their acts, means, default, privity, or consent,*" was adjudged to extend to an arrear of quit-rent, due at the time of the conveyance, although it was not shown that the rent accrued during the time the grantor held the estate.⁴ The lessor's indemnity usually extends to the acts of *himself and his heirs, and all others claiming under him*; but as to the persons who are construed to come within the meaning of the phrase, *all persons claiming under him*, it has been decided, that a person taking under an execution of a power of appointment is within a covenant for quiet enjoyment without any let, suit, &c., of the appointer, his heirs or assigns, or any person or persons claiming, or to claim, by, from, or under him; although the estate proceeded from the wife of the appointer, and he and she both joined in exercising the power.⁵ This covenant runs with the land, and is, therefore, binding on the assignees of the reversion; and may be made available by the assignees of the term.⁶

§ 308. The landlord is, in no event, under an obligation to defend the tenant, nor will he be answerable to him under this covenant, unless he has been actually or constructively evicted by some person claiming the premises under a legal title, because the

¹ Noble v. King, 1 H. Bl. 84.

² Buckley v. Williams, 8 Lev. 825.

³ Hodgson v. E. I. Co., 8 T. R. 278.

⁴ Howes v. Brushfield, 8 East, 491.

⁵ Hurd v. Fletcher, 1 Doug. 43; Evans v. Vaughan, 4 B. & C. 261.

⁶ Campbell v. Lewis, 3 B. & A. 892; s. c. 8 Taunt. 715. See *ante*, § 262, and notes. The implied covenant for title in the words "demise," &c., does not run, but like the covenants for seisin, &c., which it resembles, is broken when made. See *ante*, § 263, and notes.

law itself defends every one against wrong.¹ The covenant goes to the possession, and not to the title, and is broken only by an entry and expulsion, or by some actual disturbance in the possession.² But although a lawful eviction in some form must be shown, it need not be an eviction by process of law; it is enough that, on a valid claim being made by a third person, the plaintiff voluntarily yielded up the possession. If, however, he surrenders the possession without a legal contest, he assumes the burden of proving that the person entering had title paramount.³ The eviction, also, must appear to have taken place before suit brought.

§ 309. The mere act of forbidding a tenant to pay rent to the plaintiff, unaccompanied by any other disturbance, will not amount to a breach.⁴ Nor, under this covenant, is the landlord bound to rebuild a house in case of its destruction by fire; nor does such an event amount to an eviction, unless the landlord has expressly agreed to rebuild or keep the premises in repair.⁵ But the act of molestation, whether committed by the landlord himself, or by a servant at his command, will alike occasion a breach of the covenant.⁶ This covenant is intended to insure to the lessee a legal right to enter and enjoy the premises, and if he is prevented from entering by a person already in, under a paramount title, an action lies.⁷ In such case, no ouster or expulsion is necessary, on which

¹ *Hamond v. Dod*, Cro. Car. 5; *Nokes' case*, 4 Co. 80, b; *Pullin v. Nicholas*, 1 Lev. 88; *Lloyd v. Tomkies*, 1 T. R. 671; *Hays v. Bickerstaff*, Vaugh. 118; *Jerritt v. Weare*, 8 Price, 575; *Tisdale v. Essex*, Hob. 84 b.

² Thus it was formerly laid down that actual ouster or physical dispossession was necessary. *Waldron v. McCarty*, 3 Johns. 471; *Kortz v. Carpenter*, 5 id. 120; *Webb v. Alexander*, 7 Wend. 281; *Kerr v. Shaw*, 18 Johns. 236; and this is, perhaps, still law in New York, see *St. John v. Palmer*, 5 Hill, 699. But the prevailing doctrine now is that after a demand or other hostile assertion of the paramount title the lessee may yield thereto, taking the risk of its being the superior title, and his attornment or purchase without any actual change of possession, will be a constructive eviction and breach of the covenant of quiet enjoyment. *Grist v. Hodges*, 8 Dev. 200; *Sprague v. Baker*, 17 Mass. 586; *Loomis v. Bedel*, 11 N. H. 74; *Moore v. Vail*, 17 Ill. 190; *Curtis v. Deering*, 12 Me. 501; *Univ. Vt. v. Joslyn*, 21 Vt. 52; *Brown v. Dickerson*, 12 Pa. St. 372.

³ *Greenvault v. Davis*, 4 Hill, 643; *Cowan v. Silliman*, 4 Dev. 46; *Hamilton v. Cutts*, 4 Mass. 349; *Booth v. Starr*, 5 Day, 282.

⁴ *Witchcot v. Nine*, 1 Brownl. & G. 81. Nor where the lessor had prevented parties from hiring of the lessee; *Ogilvie v. Hull*, 5 Hill, 52. But where the lessor had also denied lessee's title, and brought suit against him and his sub-lessees to dispossess them, this was held a breach. *Levitzky v. Canning*, 33 Cal. 299. And in *Leadbeater v. Roth*, 25 Ill. 587, mere prohibition was held an eviction.

⁵ *Brown v. Quilter*, Ambler, 619; *Myers v. Burns*, 33 Barb. 401; *Womack v. McQuarry*, 28 Ind. 103. But see *Leavitt v. Fletcher*, 10 Allen, 119, where lessor's non-performance of his covenant to repair, was held no bar to his suit for rent after the destruction of the premises, and see *post*, 375, and notes.

⁶ *Seaman v. Browning*, 1 Leon. 157.

⁷ *Ludwell v. Newman*, 6 T. R. 458; *St. John v. Palmer*, 5 Hill, 699; *Williams v. Weatherbee*, 2 Aik. 329; *Hamilton v. Cutts*, 4 Mass. 349.

to predicate a suit, as the lessee is not bound to enter, and commit a trespass;¹ it must, however, be shown expressly, that he was kept out by a title existing in a third person at or before the execution of the lease.²

§ 310. The eviction must also be by title both lawful and paramount; accordingly, where the eviction was by a subordinate title, which the grantee had precluded himself from contesting by his own acts and declarations, and the recovery against him went clearly on that ground, it was held, he could not maintain an action on this covenant.³ And where a third person recovered in an action of trespass against the grantee, it was held, that the grantor was not liable on this covenant, unless it was shown, that such third person, before and at the date of the covenant, had lawful title, and, by virtue thereof, entered and ousted the plaintiff.⁴

§ 311. A mere recovery in ejectment against the covenantee is not a breach of this covenant, unless there be an actual ouster by writ of possession.⁵ But a decree in equity, directing a defendant to execute a deed and deliver possession of land, is held to be such; and the fact, that the decree is founded on a notice to him when he took the deed, of an equity in the land, does not bar his action.⁶ And although the mere existence of a better title is no breach of this covenant, yet, if it be accompanied with possession under it, commenced before the deed containing such covenant was executed, it will amount to a breach.⁷ The covenantee is not bound to defend, after notice to the covenantor, and refusal on his part to defend;⁸ and the notice in such case is not required to be in writing.⁹

¹ 1 Saund. 322; *Grannis v. Clark*, 8 Cow. 36.

² *Beddoe's Ex'or v. Wadsworth*, 21 Wend. 120. In the case of *Giles v. Dugro*, 1 Duer, 331, the defendant in the assignment of a lease to the plaintiff covenanted that the assigned premises were free and clear of all encumbrances whatsoever; but it appeared that, prior to the assignment, he had sold and assigned to one Sloan, the privilege of using the wall on the premises as a party wall of a building to be erected during the unexpired term of the lease. It was held, that such prior assignment was not a mere license, but was an absolute grant, creating a permanent encumbrance, and therefore, a breach of the defendant's covenant. And also, that Sloan having actually used the wall as the party wall of a building he had erected, it amounted to an eviction of the plaintiff, and entitled him to more than mere nominal damages.

³ *Kelly v. Dutch Church of Schenectady*, 2 Hill, 105.

⁴ *Webb v. Alexander*, 7 Wend. 231; *Lansing v. Van Alstyne* 2 Wend. 565, n.; *Phelps v. Sawyer*, 1 Aik. 150; *Maverick v. Lewis*, 3 McCord, 211. In note 2, to *Salmon v. Smith*, 1 Wms. Saund. 204, it is said, that, to occasion a suspension of rent, there must be an expulsion or eviction of the lessee; and the plea must state his eviction or expulsion, and keeping him out of possession until after the rent became due. So in *Paige v. Parr*, Style 432, and Chancellor Kent affirms the same doctrine.

⁵ *Kerr v. Shaw*, 13 Johns. 236; *Kortz v. Carpenter*, 5 Johns. 120.

⁶ *Martin v. Martin*, 1 Dev. 413.

⁷ *Grist v. Hodges*, 3 Dev. 200.

⁸ *Jackson v. Marsh*, 5 Wend. 44.

⁹ *Miner v. Clark*, 15 Wend. 425, Bronson, J., dissenting.

§ 312. If the party holding is a *wrong-doer*, the remedy of the lessee is as perfect and effectual to dispossess him after, as that of the lessor was before the execution of the lease, either by ejectment or summary proceedings under the statute. Therefore, where the lessee is prevented from entering into possession by a former tenant, whose term has expired, his remedy must be against the latter, and not against the lessor.¹ But the covenant may extend to all interruptions, legal or illegal, where there is a plain design evinced to protect the lessee against both, as if the covenant be, that the party shall enjoy against all claiming, or *pretending to claim any right, &c.* In this case, there was a pretence of right of common set up to two closes comprehended in the lease; and it was considered to be the plain intent of the parties, that all disturbance should be guarded against, for, if legal claims only were included, the tenant would be subjected to the hardship of trying the right for the landlord, which was the very thing the tenant desired to prevent by this covenant.² But on a covenant to save harmless against all lawful and unlawful titles, in assigning the breach, it must appear that he who entered did not claim under the lessee himself.³

§ 313. A *mere personal wrong* will not occasion a breach of this covenant: the molestation must be such as concerns the estate, and amounts to a prohibition of enjoyment; for if one enters and beats or assaults the lessee, the lessor cannot be charged on his covenant for such a disturbance.⁴ But an entry by the covenantor himself, however tortiously and without title, will amount to a breach.⁵ Besides, if the lessee is tortiously evicted or disturbed, he has his remedy at law; and it is only when he is legally evicted, that he has his action on this covenant.⁶ And if the covenant indemnifies him against a particular person by name, the covenantor is bound to defend him against the entry of that person, whether by title or

¹ Gardner v. Keteltas, 3 Hill, 330.

² Southgate v. Chaplin, 1 Comyn, 239; s. c. 10 Mod. 384; Lucy v. Levington, 1 Vent. 175; Hunt v. Allen, Winch. 25.

³ Norman v. Foster, 1 Mod. 101.

⁴ Ellis v. Welch, 6 Mass. 246; Penn v. Glover, Cro. El. 421; Seddon v. Senate, 18 East, 72; Noble v. Warren, 38 Pa. St. 340.

⁵ Sedgwick v. Hollenback, 7 Johns. 376; Cro. El. 544; Bennet v. Bittle, 4 Rawle, 339. In Ogilvie v. Hull, 5 Hill, 54, Chief Justice Nelson says, No principle is better settled, or more uniformly adhered to,

than that there must be an entry, and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession, depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of rent. Thus in Levitzky v. Canning, 33 Cal. 299; where the lessor had used for a time the roof of the demised premises as a wash-room.

⁶ Dudley v. Folliott, 3 T. R. 584; Wolton v. Hele, 2 Saund. 178, a, 181, a; Noble v. King, 1 H. Bl. 84.

not, and whether such entry be lawful or not.¹ Where one assigned his term for years, and covenanted that the original lease was good, and not made void or encumbered, a previous lease granted by the assignor was held to amount to a breach, although the plaintiff before the assignment, had notice of the lease, and had been attorned to by the under-tenant, and this, although no actual disturbance had arisen to the lessee;² but this has since been held otherwise in this country and with better reason.³ But the mere existence of a previous mortgage, under which the lessee is liable to be dispossessed, does not constitute an eviction; although the hostile assertion of the mortgage title, if paramount, will be an eviction, if the covenantee yields thereto and either by purchase or attornment holds under it, although his possession is never actually changed.⁴

§ 314. An averment of eviction, under an elder title, is not always necessary to sustain this action; for if the grantee be unable to obtain possession, in consequence of an existing possession or seisin by a person claiming and holding under an elder title, it is equivalent to an eviction.⁵ In another case, the breach assigned was that at the time of the demise to the plaintiff, one I. B. had lawful right and title to the premises, and, having such lawful right and title, entered and ejected plaintiff. It was objected, on demurrer, that the plaintiff, in alleging the eviction, ought to have shown the title of I. B., or at least it should have been averred that I. B. had such a title as was inconsistent with the plaintiff's title to possess those premises; that though it was alleged that I. B. had lawful right and title to the premises, he might only have had a title to recover in a real action, and not a right of entry, and that the mischief to be apprehended from this loose mode of pleading was, that it might give cover to an eviction by collusion. But the court overruled the demurrer, observing, that if the declaration was certain to a common intent it was sufficient; that it would be doing violence to the words to say, that the lawful right and title which it was stated I. B. had, did not legalize his entry: and that the fair

¹ *Foster v. Mapes*, Cro. El. 212; *Haynes v. Bickerstaff*, Vaugh. 118; *Fowle v. Welsh*, 1 B. & C. 29.

² *Ludwell v. Newman*, 6 T. R. 458; *Levett v. Withrington*, 1 Lutw. 317.

³ *Pease v. Christ*, 31 N. Y. 141.

⁴ See *ante*, § 308, and note 3.

⁵ *Duvall v. Craig*, 2 Wheat. 45; *Andrews v. Paradise*, 8 Mod. 318; *Grannis v. Clark*, *supra*. And the law laid down in *Kortz v. Carpenter*, 5 Johns. 120, seems contrary to the doctrine generally now prevailing. See *ante*, § 308, note 3.

import of the words was, that he had lawful right and title to do that which he did.¹

§ 815. It is also implied that the tenant shall have the free use of the whole of the premises ; and if he is *ousted from any material part* thereof, he may treat it as an eviction from the whole premises, and throw up the lease : nor will he any longer be responsible for rent.² But, if he prefers it, he may retain possession of so much of the property as he has not been evicted from, and sue the landlord for such damages as he has sustained from the partial eviction.³ Therefore, if a man lease a house *with estovers*, and then destroy all the wood, the lessee may have an action of covenant.⁴ So where a landlord let certain premise together with a portion of an adjoining yard and agreed that the tenant should have the use of the pump in the yard jointly with himself *as long as the same should remain there* ; though it was held that these latter words gave the landlord full liberty to remove the pump at his pleasure, yet the court agreed that if those words had not been introduced, the landlord could not have taken it away, or deprived the tenant of the use of it, without subjecting himself to the consequences of a breach of this covenant.⁵ And if a man should lease premises with a watercourse on them, and afterwards stop the watercourse, the tenant may consider it an eviction, or maintain an action for damages against him ; or if he covenants for the quiet enjoyment of a certain close, and afterwards sets up a gate across a lane leading to the close, by which the lessee is obstructed in passing to it, this is a breach of the covenant.⁶ It was said, also, to be immaterial whether the gate was erected by right or by wrong ; for, in either case, being an obstruction, it should

¹ *Foster v. Pierson*, 4 T. R. 617.

² *Etheridge v. Osborn*, 12 Wend. 529 ; *Hay v. Cumberland*, 25 Barb. 594. Nor if tenant retains the occupation of the residue can the lessor hold him for the proportionate rent thereof. *Leishman v. White*, 1 Allen, 489 ; *Christopher v. Austin*, 11 N. Y. 216 ; and see *post*, § 879, and notes.

³ *Dudley v. Folliott*, 8 T. R. 584 ; *Noble v. King*, 1 H. Bl. 34 ; or he may quit possession, and sue for an eviction from the whole premises, for all damage incurred, other than what was measured by his rent. *Chatterton v. Fox*, 5 Duer, 64 ; *Morrison v. Chadwick*, 7 C. B. 266, 284.

⁴ *Pomfret v. Ricroft*, 1 Saund. 821.

⁵ *Rhodes v. Bullard*, 7 East, 116. In

an action for damages in obstructing the lights of the plaintiff's tenement, brought by a tenant for a year against his landlord during the term, he can only recover damages for the time which had elapsed when the suit was commenced, and not for the whole term. *Blunt v. McCormick*, 8 Den. 288.

⁶ *Salman v. Bradshaw*, Cro. Jac. 304 ; *Ludwell v. Newman*, *supra* ; *Andrews v. Paradise*, 8 Mod. 818 ; *Morris v. Eddington*, 3 Taunt. 24. But in *Elliott v. Aiken*, 45 N. H. 80, on a lease of premises with a steam engine, not mentioned specifically in the lease, a withdrawal of power from the engine and entry on the demised premises to cut holes for belting from the engine, was held no eviction.

not have been erected there.¹ So on a lease of a messuage with a garden, and a house or office at the further end thereof, a covenant for the quiet enjoyment of the demised premises was held to be broken, by the building of a mansion-house on part of the garden.²

§ 316. The tenant may also be deprived of the enjoyment of the premises by the gross *moral turpitude of the landlord*; and his conduct will then be equivalent to an eviction. In a case arising in the city of New York, the facts were that the landlord let out a portion of the premises which he himself occupied, and was in the habit of introducing into his part of the house lewd women, for the purpose of prostitution, who made a great deal of indecent noise and disturbance, so as to disturb the rest of the persons sleeping in other parts of the house occupied by the tenant; that such practices were matters of conversation and reproach in the neighborhood, and were calculated to draw odium and infamy upon the house as a place of ill-fame, so that it was no longer respectable for moral or decent persons to dwell or enter therein; and that the tenant was compelled, by the repetition of such practices, to leave the premises, and did for that cause leave them; the court held that, under these circumstances, the tenant was not responsible for rent, for that the landlord's immoral conduct in this case amounted to an eviction.³ But if a tenant, by a lease under seal, abandons the premises and resists the payment of rent subsequently accruing, on the ground that other apartments in the same building adjoining, or below his, are occupied as a place of riot and prostitution, he must show that his landlord created the nuisance by leasing such apartments for that purpose, or that it existed by his connivance and consent.⁴

§ 317. The general *rule of damages* in an action for a breach of the covenant for quiet enjoyment upon an eviction is, that the purchaser recovers the consideration-money paid and interest, and not the enhanced value of the premises, whether such value has been created by the expenditure of money in improvements thereon, or by any other more general cause.⁵ But as a lessee pays no

¹ *Andrews v. Paradise*, *supra*.

² *Kidder v. West*, 3 Lev. 167.

³ *Dyett v. Pendleton*, 8 Cow. 727.

⁴ *Gilhooley v. Washington*, 4 N. Y. 217.

In this case, Bronson, C. J., says, "In the equitable action, for use and occupation, the English courts hold that the tenant is not answerable, unless he has had the beneficial enjoyment of the prop-

erty, and they have gone a great way in protecting the tenant against disturbances of all kinds; but the principle of these cases has never been applied to an action of covenant for the non-payment of rent, which does not depend on the act of occupation or enjoyment."

⁵ *Kinney v. Watts*, 14 Wend. 88; *Bender v. Fromberger*, 4 Dall. 441; 2 Wheat. 62,

purchase-money, he can recover none back upon eviction; and, in respect to any improvements he may have made upon the premises, and the money expended thereon, he stands upon the same general footing with a purchaser. The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. In case of eviction the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property. A lessee may, however, recover against his lessor the costs incurred by the former in defending the title, together with the rents which he may have paid to the lessor since the eviction, or so much thereof as he may be answerable to the true owner for, during a period not exceeding six years before suit brought.¹ Where a lessee was turned out of possession of the demised premises by the city authorities, who demolished the building, and the tenant had paid a month's rent in advance, but there was no covenant in the lease, and no charge of fraud or misconduct on the part of the landlord, the tenant was allowed to recover back so much of the advance rent, with interest, as was proportioned to the part of the month during which the plaintiff was deprived of the use and occupation of the premises; not on the ground of damages for an eviction, but upon the principle, that, to this extent, there had been a failure of consideration, the lease having been given and taken in the mutual expectation that the plaintiff would not be disturbed in the enjoyment of the premises, by any action of the corporation during the term. And it was further held in the same case, that, if no rent had been paid in advance, the lessee could have recovered nothing, his liability to pay rent ceasing from the time of the eviction.²

note e. But this rule of damages on eviction has never been adopted in New England, *Gore v. Brazier*, 3 Mass. 528; and a lessee recovers the real improved value of his lease without regard to the rent; *Dexter v. Manley*, 4 Cush. 14. In an action by the lessor for rent, the lessee may recoup damages for breach of the covenant of quiet enjoyment. *Mayor, &c. v. Mabie*, 18 N. Y. 151; *Ives v. Van Epps*, 22 Wend. 155; *Batterman v. Pierce*, 8 Hill, 171.

¹ *Kelly v. Dutch Church of Schenectady*, 2 Hill, 106. But a different rule was laid down in *Chatterton v. Fox*, 5 Duer, 64, and the lessee was allowed to recover for his improvements, and the same rule

seems to have been applied in *Ricketts v. Lostetter*, 19 Ind. 125.

² *Noyes v. Anderson*, 1 Duer, 342. Upon an executory contract to give a lease, and a failure or refusal to give one, the rule of damages is the same, if the inability or refusal is without any fault or fraud on the part of the party promising to execute it. But where the refusal to give a lease results from the fraudulent conduct of the defendant, consequent special damages, on proper allegations being embodied in the complaint, may be recovered. Per *Boasworth, J.* For which the learned judge cites *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Den. 546; *Bitner v. Brough*, 11 Pa. St. 127.

SECTION II.

THE COVENANT AGAINST ENCUMBRANCES.

§ 318. Another covenant on the part of the landlord, important to the tenant, is *for indemnity against encumbrances*, or that the tenant shall enjoy the premises free from encumbrances made, or to be made, by the landlord, his heirs, or assigns. Without this covenant a tenant may be turned out of possession, in the middle of an advantageous term, by some prior encumbrance of the landlord, unknown to the tenant, and have no redress for the injury done to him. This obligation, however, only arises in favor of a tenant for years, for if the estate is charged with an encumbrance, a tenant for life is entitled to no such indemnity from the remainder-man; for he is bound in equity to keep down the interest, taxes, and other annual charges, out of the profits of the estate; though he is not chargeable with the encumbrance itself nor bound to extinguish it.¹ And if he neglects to discharge the taxes, or other ordinary charges upon the property, a temporary receiver may be appointed to lease out the premises, until he collects rent enough to pay off such charges.² But he contributes only during the time he enjoys the estate.³ If, however, the encumbrancer neglects for years to collect his interest from the tenant for life, he may collect all the arrears from the remainder-man;⁴ but the

Where a lease contained the usual covenant for the payment of rent, and provided for the appraisal of the improvements erected by the lessee and payment of their value by the lessor at the expiration of the term, and the lessor re-entered for the non-payment of rent, it was held that the lessee could not maintain an action, upon being evicted, for the value of his improvements. *Lawrence v. Knight*, 11 Cal. 298; *Kutter v. Smith*, 2 Wall. U. S. 491. If he has any remedy at all, he must wait till the expiration of the time fixed by his contract. He cannot, by his own fault, change the terms of the contract in his own favor. *Lawrence v. Knight*, *supra*.

¹ *Swaine v. Perine*, 5 Johns. Ch. 482; *Saville v. Saville*, 2 Atk. 468; *Shrewsbury v. Shrewsbury*, 1 Ves. 233; 4 Kent, Com. 74. Tenant for life is bound to pay the annual taxes from the income of the property. *Cairns v. Chabert*, 3 Edw. 812; *Prettyman v. Walston*, 34 Ill. 175; *Varney v. Stevens*, 34 Me. 361; *Hughes v. Young*, 5 Gill & J. 67; *McMillan v. Robbins*, 5 Ohio, 28; *Bur-*

hans v. Van Zandt, 7 N. Y. 523; *Trustees v. Dunn*, 22 Barb. 402; and he is also chargeable with an equitable apportionment of assessments for local improvements. *Fleet v. Dorland* 11 How. Fr. R. 489. A water tax specifically charged for a particular use, exclusively confined to the apartments of the tenant for life, should be borne wholly by such party. *Graham v. Dunigan*, 2 Bosw. 516. As to a municipal assessment charged upon the land, it was held that the life-tenant should be charged with the interest on the assessment, and the principal upon the remainder-man. *Stilwell v. Doughty*, 2 Bradf. 311. The general rule in equity, as stated by Kent, is that a tenant for life must keep down the interest of any mortgage upon the premises, but is not chargeable with the principal. *Mosely v. Marshall*, 27 Barb. 42.

² *Cairns v. Chabert*, *supra*.

³ *Casborne v. Scarfe*, 1 Atk. 608; *Penrhyn v. Hughes*, 5 Ves. 99; *Tracy v. Hereford*, 2 Bro. Ch. 128.

⁴ *Roe v. Pogson*, 1 Madd. 582.

estate of the tenant for life would be bound to indemnify the remainder-man for the arrearage of interest accrued in his lifetime; since the tenant for life must keep down the annual interest, even though it should exhaust the rents and profits, and the whole estate is to be at the charge of the principal in just proportions.¹

§ 319. In order to justify legal proceedings on this covenant, it is not necessary that the tenant be actually interrupted or prevented from enjoying the premises, the chance alone of his being disturbed and his liability to satisfy claimants, or, in other words, the mere existence of an outstanding encumbrance, which may defeat the estate, will constitute a technical breach of the covenant, although the encumbrance is suffered to lie dormant; yet nothing more than nominal damages can be recovered before an actual injury has been sustained.² To an action on a covenant (in an assignment of a lease) for enjoyment, free and clear of all arrearages of rent, assigning as a breach, that the rent was in arrear and unpaid, it is sufficient for the defendant to plead that he left so much money in the hands of the plaintiff as would suffice to discharge the rent then in arrear to the lessor.³ But if a lessee, subject to a condition for re-entry on non-payment of rent, underlets and covenants for quiet enjoyment without the interruption of himself or of any other occasioned by his procurement or consent, his default in paying this rent, by means whereof the under-lessee is evicted, is clearly a breach.⁴

§ 320. A covenant against encumbrances, if broken by a mortgage previously given by the grantor, is broken at the time the deed is delivered,⁵ and the party need not be actually evicted.⁶ An exception immediately following such a covenant, of a *certain mortgage to a specified amount*, operates as a qualification of the covenant, which is broken if the mortgage exceeds that amount.⁷ A pre-existing right to pass over the land, to take water from a spring in it, is a breach of this covenant; so also is a public highway over the land.⁸ And evidence is not admissible to show that the

¹ 4 Kent, Com. 74; Rowel v. Walley, 1 Rep. in Ch. 218.

² Jenkins v. Hopkins, 8 Pick. 346; Chapel v. Bull, 17 Mass. 220; The People v. Nelson, 13 Johns. 840; Jackson v. Sternberg, 20 Johns. 49; Barrett v. Porter, 14 Mass. 148.

³ Griffith v. Harrison, 4 Mod. 249.

⁴ Stevenson v. Powell, 1 Bulst. 182.

⁵ Bean v. Mayo, 5 Greenl. 94; Ingersoll v. Jackson, 9 Mass. 495; Stewart v. Drake,

4 Halst. 141; Funk v. Voneida, 11 S. & R. 109; Davis v. Lyman, 6 Conn. 249; Starnard v. Eldridge, 16 Johns. 254; Wyman v. Ballard, 12 Mass. 304; Hall v. Dean, 13 Johns. 105.

⁶ Chapman v. Holmes, 5 Halst. 28; Garrison v. Sandford, 7 id. 261; Tufts v. Adams, 8 Pick. 547.

⁷ Potter v. Taylor, 6 Vt. 676.

⁸ Harlow v. Thomas, 15 Pick. 66; Mitchell v. Warner, 5 Conn. 497.

grantee knew of the existence of the easement.¹ It has been held, also, that a previous sale of part of the land, by articles of agreement, is an encumbrance on the legal estate.² So an inchoate right of dower is an existing encumbrance, and not a mere possibility or contingency.³ And an agreement for an underlease, and to take the furniture at a valuation, may be considered void, if, on taking possession, the rent is found to be in arrear, and a charge on the goods.⁴

§ 321. The words *permitting* and *suffering* do not bear the same meaning as *knowing of* and *being privy to*; the meaning of the former is, that the party shall not concur in any act over which he has a control, and such a covenant extends only to such permissive acts of the lessor, as had through that permission an operative effect in charging the estate.⁵ We may observe also, that, if a covenant against encumbrances has been broken before an assignment by the lessee, which have not been removed, the covenant will pass to the assignee, so as to entitle him to any damages he may sustain after the assignment; for this is not a mere assignment of a chose in action, but there is a continuing breach, and the ground of damages has been enlarged since that time.⁶

§ 322. The rule of damages, upon the breach of a covenant against encumbrances, is said to be the amount which the plaintiff has lawfully paid, to discharge the encumbrance; but if he has not paid off the encumbrance, he is still entitled to nominal damages, because an outstanding encumbrance is a technical breach of the covenant, although it does him no harm until he is evicted under it, or until he pays it, which he may do without waiting to be evicted.⁷ And after he has been evicted, the costs he was put to in defending the action by which he was evicted, will form part of the damages he will be entitled to recover.⁸

¹ Kellogg v. Ingersoll, 2 Mass. 97; Hubbard v. Norton, 10 Conn. 481; Prichard v. Atkinson, 8 N. H. 335. This seems to have been doubted in a New York case, Whitbeck v. Cook, 15 Johns. 483.

² Seitzinger v. Weaver, 1 Rawle, 382.

³ Porter v. Noyes, 2 Greenl. 22.

⁴ Partridge v. Sowerby, 8 B. & P. 172.

⁵ Hobson v. Middleton, 6 B. & C. 295.

⁶ Sprague v. Baker, 17 Mass. 586.

⁷ Dimmick v. Lockwood, 10 Wend. 142; Delavergne v. Norris, 7 Johns. 358; Starnard v. Eldridge, *supra*; Prescott v. True-

man, 4 Mass. 627; Hall v. Dean, 18 Johns. 105; Garfield v. Williams, 2 Vt. 327; Garrison v. Sandford, 7 Halst. 281. In an action on the covenant of seisin, for the purpose of ascertaining the measure of damages, the true consideration, and the fact that only part of it has been paid, may be shown by parol, although the deed expresses a different consideration, and acknowledges that the whole of it has been paid; and there is no occasion, in such a case, to resort to a court of equity for relief. Bingham v. Weiderwax, 1 N. Y. 509.

⁸ Waldo v. Long, 7 Johns. 178.

SECTION III.

FOR FURTHER ASSURANCE.

§ 323. A third covenant, on the part of the landlord, sometimes inserted in a lease, is the covenant, *for further assurance*, by which the lessor contracts that he will, at any time, perform and execute such further reasonable acts, writings, and conveyances of the premises, as the lessee's counsel may legally advise to be necessary, for completing the transfer of such an interest, or term, as the parties have contracted for. This covenant is not usually introduced, because the covenant for quiet enjoyment necessarily implies that the lease is perfect, as a good and valid demise; and granting an imperfect, and therefore a bad lease, would be a breach of the latter covenant. It is always, however, inserted in conveyances of freehold property, and sometimes in assignments of leasehold premises. It is a covenant running with the land, of which an under-tenant may avail himself, as well as the original lessee;¹ and may be important to both, inasmuch as it relates to the title of the lessor, and also to the instrument of conveyance; operating as well to secure the performance of all acts for supplying defects in the former, as to remove all objections to the sufficiency and security of the latter.

§ 324. If there be a defect in the title, the lessor will be decreed, under this covenant, to convey to the lessee such a title as he may afterwards obtain; even although he acquired it by purchase, for a valuable consideration.² And under it a lessee may require the removal of a judgment, or other encumbrance which endangers his possession.³ Where a party covenanted that he had not done, nor permitted, nor suffered to be done, any act whereby the estate was encumbered, it was held that his assent to an act, which he could not have prevented, was no breach of this covenant.⁴ And where a defendant, by an agreement of present demise, let premises to the plaintiff, which the parties in possession refused to quit, the defendant was held bound to put the plaintiff in

¹ *Middlemore v. Goodale*, Cro. Car. 508.

² *Middlebury College v. Cheney*, 1 Vt. 386; *Taylor v. Debar*, 1 Ca. in Ch. 274; s. c. 2 *id.* 212; *Seabourne v. Powell*, 2 Vern. 11; and see *Langford v. Pitt*, 2 P. Wms. 630.

³ *King v. Jones*, 5 Taunt. 427. A mortgagor is not bound to release his equity of redemption. *Atkins v. Uton*, 1 Ld. Ray. 36.

⁴ *Hobson v. Middleton*, 6 B. & C. 295.

possession, as a contract to do so was implied; and that the plaintiff might maintain an action for the breach of such a contract, and was not obliged to resort to an action of ejectment against the wrongful occupant.¹ A lease and entry by the lessee is not a disseisin in fact, unless the entry be forcible, or with a manifest intention to disseise. A disseisin, being the wrongful act of a stranger, it is no breach of the covenant against defects in the title, that the person, under whom the vendor derives title, had leased part of the premises sold, to one who had afterwards entered on the premises demised.²

§ 325. The term *reasonable act*, generally made use of in this covenant, means such an act as the law requires; but if it be unnecessary, it is not a reasonable act, nor one which would be required by law. Therefore, a refusal to do something, which, if executed, would be useless and nugatory, will not constitute a breach of this covenant.³ The covenant, to make such assurance as the lessee's counsel shall advise, requires that the counsel shall give his advice, and that the covenantor shall be notified thereof. It also requires that the covenantee procure the instrument to be drawn and tendered to the covenantor for execution.⁴

§ 326. According to the English cases, if a covenantor can read the deed, he is bound to execute and deliver it immediately upon its being tendered to him for execution; and he will not be allowed time to obtain the opinion of counsel; although he may not be acquainted with the legal sense and operation of the words, and whether they agree with his covenant or not. But if it is written in a language he does not understand, he may refuse to deliver it, until he can procure some one to explain it to him.⁵ The same rigidity, however, does not appear to exist in our law, for in an action upon a covenant for further assurance, "as by the plaintiff or his counsel should be reasonably devised, advised, or required," the breach assigned was, that the plaintiff had requested the defendant to make a lawful and reasonable assurance to the plaintiff, of the right of dower of defendant's wife, yet the said defendant had not made such assurance, &c.; on demurrer, the breach was

¹ *Coe v. Clay*, 5 Bing. 440.

² *Jerritt v. Weare*, 8 Price, 575. A wrongful possession does not divest the title of the person against whom possession is held adversely. *Doe v. Hull*, 2 D. & R. 88.

³ *Warn v. Bickford*, 9 Price, 48.

⁴ *Bennet's case*, Cro. El. 9; *Stafford v. Bottrone*, *ib.* 298; *Baker v. Bulstrode*, 1 Mod. 104.

⁵ *Manser's case*, 2 Co. 8, a; *Wotton v. Cooke*, 8 Dy. 837, b; 1 Rol. Abr. 441; *Symms v. Smith*, Cro. Car. 299.

holden bad; for the plaintiff, or his counsel, were to devise the further assurance, and, after having done so, the plaintiff was bound to give notice thereof to the defendant, allowing him a reasonable time to consider of it; and such facts ought to be averred.¹

SECTION IV.

THE COVENANT TO REPAIR.

§ 327. The landlord sometimes covenants to *repair*; and for his own sake will generally prevent the premises from running to decay; but unless he binds himself by an express agreement to that effect, the tenant, whether for life, for years, or at will, cannot compel him to repair. The common law has always thrown the burden of repairs, as much as possible upon the tenant. Enjoying the benefits, it is right that he should bear the inconveniences; and it would be unjust that the expense of accumulated dilapidation should, at the end of the tenancy, fall upon the landlord, when a small outlay on the part of the tenant in the first instance, would have prevented any such expense becoming necessary.

§ 328. In conformity to this principle, it was laid down by Chief Justice Savage, that at common law "it is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do this. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent."² As in a case where there was a lease of a house, with the use of a pump standing on the lessor's premises, it was held the tenant had no remedy against the landlord for suffering the pump to be out of repair, unless he had agreed to keep it in repair.³ So where a tenant, under a covenant to repair, pulled down a party-wall (being in a ruinous condition), and rebuilt it at the

¹ *Miller v. Parsons*, 9 Johns. 836; *Sweitzer v. Hummel*, 3 S. & R. 228.

² *Mumford v. Brown*, 6 Cow. 475; *Casad v. Hughes*, 27 Ind. 141; *Howard v. Doolittle*, 3 Duer, 464; *Sherwood v. Seaman*, 2 Bosw. 127; *Post v. Vetter*, 2 E. D. Smith, 248. The landlord is not bound to repair, but the tenant is. *Kellenberger*

v. Foresman, 18 Ind. 475; *Elliott v. Aiken*, 45 N. H. 30; so *Corey v. Mann*, 14 How. Pr. R. 168. The landlord is not liable for injuries to the tenant by want of repair. *Brewster v. De Fremery*, 33 Cal. 841.

³ *Pomfret v. Ricroft*, 1 Saund. 321; 7 East, 116; *Surplice v. Farnsworth*, 7 M. & G. 576; *Gott v. Gandy*, 2 Ellis & B. 845.

joint expense of himself and the occupant of the adjoining house, to whom he had given notice in the landlord's name, but without his authority, he could not maintain an action against his landlord for a moiety of the expense of rebuilding such party-wall.¹

§ 329. And if the premises have become uninhabitable by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him, either at law or equity, to expend the money so recovered, in rebuilding, unless he has expressly engaged to do so.² Nor will a court of equity, under such circumstances, prevent the landlord from even suing for the rent, until he shall have rebuilt the premises;³ for the tenant—unless there is an express agreement to the contrary, or the landlord is under a covenant to repair—is obliged to continue the payment of rent during the term, although the premises may become untenable, for want of repairs, or from any other cause, or should even be burnt down in the mean time.⁴

§ 330. The doctrine above stated is to be taken with a qualification so far as it is applicable to the State of New York, where by a recent statute a landlord is bound to keep his premises in tenantable condition if he intends to retain the tenant. For the latter may at any time quit and surrender any building in his occupation, which, without his fault or neglect, shall be destroyed, or be so much injured by the elements or any other cause, as to become

¹ *Pizey v. Rogers*, Ry. & M. 357. In Louisiana, the landlord is bound to keep the premises in tenantable condition; and, if he fails to make the necessary repairs, the tenant may make them, and deduct the amount he has paid out of the rent. *Perrett v. Dupré*, 3 Rob. La. 52. Code, Art. 2664. But to recover the cost of such repairs from the landlord, the tenant must be prepared to show, that the lessor refused or neglected to make them, although requested to do so; that they were indispensable, and such as the lessor was bound to make; and that the price paid was reasonable. *Shall v. Banks*, 8 *id.* 168; Code, Art. 2663. A covenant to keep the premises in repair, was held to be broken, by permitting the flues in a hotel to remain in such condition, that the rooms could not be used with a fire in consequence of the issuing of smoke from the grate into the room whenever a fire was lighted therein. *Myers v. Burns*, 35 N. Y. 239.

² *Pindar v. Rutter*, 1 T. R. 812; *Carter v. Rockett*, 8 Paige, 437.

³ *Leeds v. Cheetham*, 1 Sim. 146; *Belfour v. Weston*, 1 T. R. 810; *Holtzapfel v. Baker*, 18 Ves. 115. So *Loft v. Dennis*, 1 Ellis & E. 474, where the insurers had the option whether to pay or rebuild, and elected to pay; and the tenant averred that he should have insured if there had not been this insurance on the premises; this was held, on demurrer, no defence to action for use and occupation.

⁴ *Moffatt v. Smith*, 4 N. Y. 126. Failure of the landlord to fulfil his agreement to keep the premises in repair, is no defence to an action for rent. *Tibbits v. Percy*, 24 Barb. 39; *Watts v. Coffin*, 11 Johns. 495. An agreement of the landlord, indorsed on the lease, to make certain improvements in consideration of the letting, is an independent agreement, a breach of which does not discharge the lease, nor a surety for the rent. *Ellis v. McCormick*, 1 Hilt. 818. Nor does the

untenantable and unfit for occupation.¹ A different rule also prevails in Louisiana, where it is held, that a lessor is bound to keep the premises in a condition fit for the purposes for which they were leased. If he fails to make the necessary repairs during the lease, the tenant may make them himself, and deduct the amount from the rent. The lessor is there also bound to indemnify the lessee for all damage sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of their existence, at the time of the lease, and even where they have arisen since. But where, after the commencement of a lease, the house becomes so much injured as to be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offers to dissolve the lease, which the lessee refuses, and continues to occupy the building; it was held, that the lessor will not be responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter will not be entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease.²

§ 331. When a landlord has expressly covenanted to repair, the obligation will be enforced; and, if he sues for rent, the tenant may recoup any damages he has sustained by the landlord's breach of the agreement.³ But no implied covenant to rebuild, or repair damages on the part of the landlord, arises at common law, from the exception of casualties by fire and tempest, in the lessee's covenant to repair. As in a case where an action was brought for half a year's rent; the defendant pleaded that he covenanted to repair *casualties by fire and tempest excepted*; that a violent tempest arose, and threw down a stack of chimneys belonging to the house, and

destruction of the premises which the landlord had covenanted to repair. *Leavitt v. Fletcher*, 10 Allen, 121.

¹ Laws of New York of 1860, page 592; and see, *post*, § 375.

² *Perrett v. Dupré*, 8 Rob. La. 52; *Coleman v. Haight*, 14 La. An. 564.

³ *Whitbeck v. Skinner*, 7 Hill, 58; *Nichols v. Dusenbury*, 2 N. Y. 238; *Wright v. Lattin*, 38 Ill. 298; *Lunn v. Gage*, 37 id. 19. And the lessor's covenant to repair, like the lessee's, binds him to rebuild, even after destruction by inevitable accident. *Leavitt v. Fletcher*, 10 Allen, 119. He may recoup only the amount the repairs would have cost, and

not special damages. *Dorwin v. Potter*, 5 Den. 306. He is entitled to the amount necessarily expended by him in repairing the premises, and also to the damages sustained by the loss of the use of such parts of the premises as were rendered untenable for want of repairs. *Myers v. Burns*, *supra*. And if the landlord is to repair the premises before the tenant takes possession, it is a condition precedent to the collection of rent, and the tenant may abandon the premises; and the fact that he went into possession before the day stipulated is no waiver of the repairs as a condition precedent. *Strohecker v. Barnes*, 21 Ga. 480.

damaged the house so much, that it would have become uninhabitable, if he had not repaired it, and that he laid out £30, which he was ready to set off against the rent claimed. The court held, that the landlord was under no obligation to repair damages occasioned by fire or tempest, and that the exception was introduced into the lessee's covenant for his benefit, and to exempt him from particular repairs.¹ If the landlord has expressly agreed with his lessee that he will in case the premises shall be burned, rebuild and place them in the same condition they were in *before the fire*, he is only bound to restore the premises to the same state in which they were *before he let them*, and is not bound to rebuild any such additions as the tenant may have made himself. And the tenant is bound to continue the payment of rent while the premises are rebuilding, provided there is no unnecessary or unreasonable delay on the part of the landlord to rebuild, after he had been notified of the destruction of the premises.² As this is a covenant running with the land, it is one of which an assignee of the term or an under-tenant may have the benefit; and it is also obligatory upon a grantee of the reversion.³

SECTION V.

THE COVENANT TO RENEW THE LEASE.

§ 332. Another covenant, sometimes inserted in the lease, on the part of the landlord, adding much to the stability of a lessee's interest, and affording an inducement to permanent improvement, is, that he will *renew the lease* at the expiration of the term, for the same, or some other period mentioned. Under this covenant the lessor is bound to make another lease, either to the lessee or his assignee; and if the terms of such covenant are express and une-

¹ *Weigall v. Waters*, 6 T. R. 488. A lessor is not liable to repair under a covenant for quiet enjoyment, notwithstanding the premises are destroyed by fire. *Brown v. Quilter*, Amb. 619; s. c. 2 Eden, 219.

² *Loader v. Kemp*, 2 C. & P. 875. If the owner of a building is bound to repair, he is not relieved from his liability for injuries caused by defects in the building, or by the falling of snow and ice therefrom. *Kirby v. Boylston Market*, 14 Gray, 249. When the landlord is bound to repair, and enters for that purpose, he

is not liable in damages, for interrupting the business of the lessee or otherwise in the exercise of such right, unless it appears to have been done in a wanton, unskilful, or negligent manner. *Turner v. McCarthy*, 4 E. D. Smith, 249. In an action for a breach of the landlord's covenant to repair, the tenant cannot recover for rent lost by his under-tenants leaving the premises in consequence of their condition, unless especially averred. *Oettinger v. Levy*, 4 E. D. Smith, 288.

³ *Demarest v. Willard*, 8 Cow. 206; *Allen v. Culver*, 8 Den. 284.

quivocal, the performance of it will be duly enforced by a court of equity.¹ If the covenant be to renew, at the request of the lessee (without naming his executors), within the term, and the lessee die; the executors are entitled to the renewal, if they apply within the term.² A covenant that the lessee shall have the refusal of the premises, at the expiration of the lease, for a specified term, is a covenant to renew the lease, at the same rent for such term. It is violated by the lessor, if he refuses to renew the lease except at an increased rent. And the acceptance by the lessee of a new lease, at the increased rent after such violation, at the same time protesting against a right to exact the increased rent, and claiming to reserve his right of action, for the breach of the covenant, will not prevent him from recovering as damages for the lessor's breach of the covenant, the difference between what the tenant was to have paid and what he was compelled to pay. And the lessee in such a case is not obliged to wait until the actual termination of the lease before he makes his election to have the lease renewed; for the lessor is bound to renew when the lessee makes his election, and demands the renewal.³ This is also a covenant running with the land, and a purchaser of the estate will be bound by it.⁴

¹ *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Pritchard v. Ovey*, 1 Jac. & W. 396; *Rees v. Ld. Dacre*, cited 9 Ves. 332; *Tritton v. Foote*, 2 Bro. Ch. 636; *Iggulden v. May*, 9 Ves. 325; s. c. 7 East, 287; *Furnival v. Crew*, 3 Atk. 88. The agreement often is, that the lessee has or is to have the privilege of additional years. In this case, as no act is to be done by the lessor, the tenant's merely remaining, sufficiently shows his election to continue. *Kramer v. Cook*, 7 Gray, 550; *Levitzky v. Canning*, 38 Cal. 299; *House v. Burr*, 24 Barb. 525.

² *Hyde v. Skinner*, 2 P. Wms. 196; *Chapman v. Dalton*, 1 Plowd. 286. With some corporations, as, for instance, Trinity Church in New York, and even with private individuals, it is usual to grant a new lease to the tenant in possession, at the end of the term; from which fact many tenants claim a right of renewal. But, independent of some positive local custom, — of which none such exists that the writer is aware of, — it is a demand that cannot be enforced at law; nor have applications to equity for the purpose been attended with greater success. The so-called *tenant-right of renewal* confers no positive interest, either vested or contingent; and is a mere naked possibility, depending solely on the caprice of the lessor. A right of

renewal must be the result of express compact; and to secure it is the object of the covenant we are now discussing.

³ *Tracy v. Albany Exch. Co.* 7 N. Y. 472; *Driggs v. Dwight*, 17 Wend. 71. And it has been held that the lessee is not merely entitled, but bound, to notify the lessor before the expiry of the first term of his election to have a renewal. *Renoud v. Daskam*, 34 Conn. 512. In New York, a lease of agricultural lands for twelve years, with a covenant of renewal for twelve years longer if the lessor shall live, and a further covenant to continue the renewals every twelve years so long as the lessor shall live, is good for the first twelve years, but the covenants for renewal are in contravention of the constitution of that State (Art. 1, § 14), and therefore void. The covenant for renewal, being independent, may fall without impairing the grant for the first twelve years. *Hart v. Hart*, 22 Barb. 606. See *Stephens v. Reynolds*, 6 N. Y. 454. *Ante*, § 74.

⁴ *Piggot v. Mason*, 1 Paige, 412; *Richardson v. Sydenham*, 2 Vern. 447; *Earl Brook v. Bulkeley*, 2 Ves. sr. 498; 4 Kent, Com. 109, 3d ed. The good-will of a lease, which means, a reasonable expectation of its renewal by the landlord, is an interest of value, which, as such, courts of equity will protect.

§ 333. A covenant to let the premises to the lessee at the expiration of the term, without mentioning any price for which they are to be let; or to renew the lease upon such terms as may be agreed on in neither case amounts to a covenant for renewal, but is altogether void, for uncertainty. Nor will a general covenant for *renewal* be construed to imply a perpetual renewal, unless the words are expressly to that effect; the most a lessor is bound to give on such a covenant is a renewal for one term only.¹ Covenants for continued renewals are not favored, since they tend to create a perpetuity; but where they are definite and reasonable, the law sustains them. A covenant to renew a lease "under the *same covenants* contained in the original lease" is satisfied by a renewal of the lease for another term, omitting the covenant to renew.² For if the continued grant of successive leases, and not a single renewal only had been intended, words would naturally have been made use of, indicating such an intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such cannot be a reasonable construction. Under certain circumstances, a grant of this character may not be unreasonable; but in every case the intention must be expressed without ambiguity. It is said to be even better for avoiding fraud, to suffer a party to escape out of a contract which he may have intended to make, than to enforce it upon a conjecture that such was the intent of the parties.³

§ 334. A covenant which does not plainly imply or express a

Hence a transfer of the good-will, when embraced in an assignment of the lease for value, is an essential part of the agreement of the parties, and as a valid contract necessarily implies that no act shall be done by the lessee, to deprive his assignee of the benefit which the transfer was meant to secure to him. And, if a lessee, after such a transfer, and before the expiration of the term covered by the lease, secretly obtains from the landlord, a renewal of the lease to himself, he violates, if not the letter, the intent and spirit of his contract. Such an act is a breach of good faith, involving a sacrifice of interests he was bound to protect; and a court of equity will not suffer him to hold any advantage so obtained, but will compel him to assign it. *Bennett v. Vansyckel*, 4 Duer, 462.

¹ *Whitlock v. Duffield, Hoffm.* Ch. 110; *Abeel v. Radcliff*, 18 Johns. 297;

Rutgers v. Hunter, 6 Johns. Ch. 215; *Moore v. Foley*, 6 Ves. 287; *Taylor v. Stibbert*, 2 Ves. 448; *Richardson v. Sydenham*, *supra*; *Iggulden v. May*, *supra*. But a covenant to "renew and to continue to renew," is a covenant for a perpetual renewal. *Page v. Esty*, 54 Me. 819.

² *Carr v. Ellison*, 20 Wend. 178; *Richardson v. Sydenham*, *supra*; *Tritton v. Foote*, 2 Bro. Ch. 636; *Tracy v. Albany Exch. Co.* 7 N. Y. 472. A lease giving the lessee the privilege of additional years "if desired" and on notice one month before a time specified, continues on such notice being given for the additional term upon all the covenants and agreements of the former lease without the execution of any new lease. *House v. Burr*, 24 Barb. 525.

³ *Iggulden v. May*, *supra*; *Willan v. Willan*, 16 Ves. 84; *Baynham v. Guy's Hosp.* 3 *id.* 298; *Kirkham v. Chadwick*, 13 *id.* 549; *Harnett v. Yeilding*, 2 Sch. & L. 558.

perpetual renewal will not be construed to give this right; but a covenant to renew, in general terms, not specifying the particular period for which the renewal is to be made, as to grant such further lease as the lessee, his executors, &c., shall desire; will receive a reasonable construction.¹ It has also been decided, in a recent English case, that a covenant to renew from time to time, and to perfect such other further assurance as the lessee should require, at such rents and under such covenants as were contained in said indenture of lease, at the charge of the lessee, was to be construed as a covenant for further assurance, and not for perpetual renewal.²

§ 335. Sometimes this covenant is in the alternative, either to renew or to pay the appraised value of the buildings to be erected by the lessee during his term; the appraisement in such a case is considered in the light of an arbitration, and is final between the parties as well as between their personal representatives.³ And where, in a building lease for twenty-one years, at a certain annual rent, it was covenanted, that, at the expiration of the term, the buildings to be erected, and the improvements to be made by the lessee, should be valued in the manner specified in the lease; and if the lessor should not abide by and pay the amount of such valuation, he should renew the lease or redemise the lot, at such rents and upon such terms as might be agreed upon between the

¹ Thus in England on a farming lease for five years, twenty-one years was held a reasonable period of renewal, because such was the usual period of terms. *Hyde v. Skinner*, 2 P. Wms. 196. "The meaning of this covenant," said Ld. Ch. Macclesfield, "was that the lessee might be reimbursed, the money he had laid out in improvements. But . . . he can only have a renewal for the usual term of twenty-one years. And though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewal of a new lease, forasmuch as then the lease would never end." In America, however, as there is no usual period for leases, the renewal would be given for the same length as the original term.

² *Brown v. Tighe*, 8 Bligh, n. s. 272. This covenant may be qualified by various other conditions. Thus see *Tallman v. Coffin*, 4 N. Y. 134; and § 335 and notes, *post*. That the tenant may keep possession, after the expiration of the term, until the covenant has been performed on the part of the landlord; but is not dis-

charged from the payment of rent during his prolonged occupancy. See *Holsman v. Abrams*, 2 Duer, 485. *Post*, § 538, note 6.

³ *Van Cortland v. Underhill*, 17 Johns. 406; *Holliday v. Marshall*, 7 *id.* 211; *Renwick v. Renwick*, 1 Bradf. 234. Where a lessee having been notified that the lessor had appointed an arbitrator, under a covenant for a renewal, and being required to appoint one on his own behalf before the expiration of the lease, fails to do so, he does at the option of the lessor waive his right to such renewal; and if afterwards, the lessor requires him to pay a specific rent, and he holds over, it may be regarded as a new letting from year to year, and not a renewal of the former lease; and the tenant may in such case be dispossessed by summary proceedings on non-payment of rent. If the lease is silent as to when the arbitrators are to be appointed, it means they shall be appointed a reasonable time before the expiration of the lease. *Wells v. De Leyer*, 1 Daly, 39.

parties; at the end of the term, the lessee refused to accept a redemise of the lot upon any terms, and insisted upon being paid for his buildings and improvements, according to the valuation thereof made pursuant to the covenant in the lease; and the lessor tendered a renewal of the lease, for the same term and for the same rent, without any covenants as to buildings, or paying for buildings or improvements; Chancellor Kent held that the lessee was bound to accept the renewal of the former lease so tendered, or give up all claim to be paid for the buildings or improvements.¹ If a tenant claims a right of renewal by force of a long-continued custom to renew, independent of any covenant to that effect, the mere fact of his having expended money in improving the estate will not give him a right to demand such renewal in a court of equity. There must be some covenant or agreement, or at least some arrangement with the tenant, equivalent to an agreement relative to the improvements, by which the landlord has encouraged him to proceed. Equity will then consider such arrangement as an implied agreement that the tenant shall have the benefit of his expenditure, and interfere to prevent the landlord from putting an end to the tenancy.²

¹ *Rutgers v. Hunter*, 6 Johns. Ch. 215. In New York, the covenant to pay for improvements made by a lessee, during the continuance of his term, is of frequent occurrence. The lessor of premises covenanted, that if the lessee should erect a two-story dwelling-house, corresponding in elevation with a house already built on a part of the demised premises, he would, at the termination of the lease, pay for the building so erected, at a valuation to be made by appraisers. The tenant erected a building which did not correspond in height with the house referred to, and was not finished as a dwelling-house, although it was capable of being turned into one with little expense; the lessor made no objection, although he had full knowledge of the character of the building, and did not intimate that any question would be raised as to the lessee's right to be paid for the building as it stood. It was held that in the absence of fraud, or a waiver on the part of the lessor, inducing the lessee to depart from the terms of the covenant, the lessee could recover nothing for the building. *Pike v. Butler et al.*, 4 N. Y. 360, reversing s. c. in 4 Barb. 660. When, simultaneously with the execution of a lease for a term of years, an agreement is made whereby the landlord stipulates, that, at end of

the term he will renew the lease or pay for the buildings erected by the tenant, and, at the end of the term he tenders a renewal, which the tenant refuses to accept, the landlord is entitled to recover possession without paying for the buildings. *Pearce v. Colden*, 8 Barb. 522. Where there was a fair effort on the part of the assignee of the lessee to have the improvements appraised, they were in fact valued before the expiration of the term, their value was ascertained and proved to the court, and the heirs had received the benefit of the improvements in the enhanced value of the property, the court held, in the exercise of its equitable powers, that the time of the stipulated appraisal was not so far essential to the substance of the contract as to destroy the claim for the value of the improvements. *Renwick v. Renwick*, *supra*.

² *Pilling v. Armitage*, 12 Ves. 78; *Robertson v. St. John*, 2 Bro. Ch. 140; 1 Eq. Cas. Abr. 19. A covenant to pay at the end of the term for all the buildings and improvements that may be made on the land, means, on a reasonable construction, to pay for such as are on the land at the end of the term. *Van Rensselaer v. Peniman*, 6 Wend. 569. An agreement to pay for all buildings and improvements to be erected by the lessee does not extend

§ 335 *a*. This covenant is sometimes varied by a stipulation to convey the premises to the lessee, at the end of the term, at a certain specified sum, if the lessor shall decline to pay for the improvements at their appraised value. In a case of this kind it was held that the assignee of a moiety of the premises might compel a performance of the contract, either by a suit in the name of all, or, if the others refuse to sue, in his own name, the court protecting the rights of all the parties.¹ But where a lessor covenanted that if the lessee should divide the premises into lots of certain dimensions, and the sub-lessees should erect buildings thereon, of a certain description, that they should severally have the privilege of purchasing their lots at the end of the term; it was held that the erection of a building partly on both, or buildings of an entirely different description on each, gave them no right to purchase.² And we may here observe, that, independent of an agreement, the law imposes no obligation upon a landlord to pay the tenant for improvements he has made during his term; the tenant's right in respect thereto has never been extended further than to allow him to remove them before the expiration of his term.³

§ 336. In the case of church leases, and leases from the trustees of a charity, where the lessors are in the practice of giving new leases to their tenants from time to time, upon the payment of a renewal fine, or a reasonable addition to the rent, the tenant, in regard to third persons, has been held to possess a vendible interest in such imperfect right of renewal, which a court of equity will recognize and protect, although such renewal depends upon the mere volition of the lessors. And if a person, who has a particular or special interest in such a lease, obtains a renewal of it in consequence of his being in possession as tenant, or from his having such special interest, the renewal lease is in equity considered as a mere continuance of the original lease, for the protection of the

to ordinary repairs. *Lametti v. Anderson*, 6 Cow. 802. Where a lessor covenanted to renew or "to pay the value of such buildings as should be erected in pursuance of the lease," and by the terms of the lease the lessee was to make the buildings fire-proof within two years; but the lessee having failed to make the buildings fire-proof, it was held that the covenant to pay could not be enforced. *Fisher v. Fisher*, 1 Bradf. 335. Although equity cannot specifically enforce a covenant to

pay for the tenant's improvements, at an appraisal to be made, yet where the landlords are trustees and not the original lessors, and refuse to renew, the court may decree payment from the buildings from the trust fund. *Robinson v. Kettletas*, 4 Edw. 67.

¹ *Van Horne v. Crain*, 1 Paige, 455; *Ostrander v. Livingston*, 8 Barb. Ch. 416.

² *Ostrander v. Livingston*, *supra*.

³ *Kutter v. Smith*, 2 Wall. U. S. 491.

rights of all parties who had any legal or equitable interests in the old lease. Accordingly where a complainant, as the lessee of premises, part of which had been let by him to an under-tenant, contracted with the defendants to sell his interest in the premises to them, for the purpose of enabling them to obtain a renewal, without prejudice to the rights of the sub-lessee, and the defendants, in consequence of such agreement, obtained a new lease of the premises in their own names, and then evicted the sub-lessee, by which the complainant was compelled to make good the loss or damage sustained by him; it was held that the complainant was entitled to a specific performance of the agreement, and to be indemnified against the claim of the sub-lessee; and that he had a lien for the unpaid purchase-money upon the legal interest in the premises, which the defendants had acquired under their new lease.¹

§ 337. Insolvency,² or the commission of a felony, on the part of the covenantee,³ will prevent a decree for the specific performance of a covenant of renewal. Nor will the court enforce performance where a tenant has committed waste, treated the land in an unhusband-like manner, or been guilty of a breach of covenant, for which the lessor has a right of re-entry.⁴ Nor in cases where the agreement to renew has been accompanied by fraud or misrepresentation;⁵ or the tenant has already been guilty of wilful breaches of a covenant, agreed to be inserted in the new lease.⁶ But a surrender and conveyance to the lessor of an under-lease is no bar to a claim on the part of the lessee, or his assigns, for a renewal of the original lease, according to the covenant.⁷ And if a tenant assigns his contract to a third solvent party, and afterwards becomes bankrupt or insolvent, the court will decree a specific performance against the landlord, in favor of such third party.⁸ Injuries accruing to the landlord by the acts of the tenant, but which do not amount to a breach of covenant, form no ground for refusing a decree for the specific performance of the contract;

¹ *Phyfe v. Wardell*, 5 Paige, 268; *Anderson v. Lemon*, 8 N. Y. 236. Where one of several joint tenants obtains a renewal to himself alone, it will enure to the benefit of all. *Burrell v. Bull*, 3 Sandf. Ch. 15; *James v. Dean*, 11 Ves. 388; s. c. 15 *id.* 236; *Featherstonhaugh v. Fenwick*, 17 *id.* 298; *Pickering v. Vowles*, 1 Bro. Ch. 197; *Mulvany v. Dillon*, 1 Ball & B. 409.

² *Buckland v. Hall*, 8 Ves. 92; *Featherstonhaugh v. Fenwick*, *supra*; *De Minck-*

witz v. Udney, 16 *id.* 466; *Hyde v. Skinner*, 2 P. Wms. 196; *O'Herlihy v. Hedges*, 1 Sch. & L. 123.

³ *Willingham v. Joyce*, 3 Ves. 169.

⁴ *Hill v. Barclay*, 18 Ves. 68; *Gourlay v. Duke of Somerset*, 1 Ves. & B. 68; *Lovat v. Ranelagh*, 3 *id.* 29.

⁵ *Pendred v. Griffith*, 1 Bro. P. C. 314.

⁶ *Hill v. Barclay*, 18 Ves. 68.

⁷ *Piggot v. Mason*, 1 Paige, 412.

⁸ *Crosbie v. Tooke*, 1 Mylne & K. 481; *Morgan v. Rhodes*, 1 Mont. & A. 214.

and, therefore, where the tenant, under an agreement for a building lease, had built a brew-house, which injured the value of the landlord's other property in the neighborhood, but there was no covenant not to build a brew-house, the court decreed performance; saying, that if the erection became a nuisance, the defendant had a remedy at law.¹ And where the covenant to renew is an independent one, the fact that the lessee was liable to the lessor for rent upon another covenant, contained in the lease, does not excuse its performance.²

§ 338. As every contract depends upon *the consideration* for its validity, it is necessary that there be a sufficient and reasonable consideration, on the part of the lessee, to support this covenant; for if an agreement for a renewal be unequal, unjust, or inserted by mistake, a specific performance will not be decreed. A bill was filed on a covenant for the renewal of a leasehold estate, of the yearly value of £130, at a fine of £3, by an addition of ten years; but as there was no adequacy of price for this renewable perpetuity, no onerous services on the part of the lessee, no money advanced, and no improvement made, the bargain was considered so hard and injurious that the bill was dismissed.³ For a similar reason, a voluntary agreement indorsed on a lease, by one not a party to it, but only a remainder-man, will not bind him to the performance of a covenant for renewal, contained in such a lease.⁴ So a promise by letter to renew a lease, in consequence of money already expended on the premises, is a void promise, being founded upon a past consideration, which equity will not enforce. Nor will the laying out of money afterwards, if it is voluntary, vary the case; but if the promise is founded on a previously expressed intention of doing so, which is not objected to, a specific performance will be decreed.⁵

§ 339. If the tenant is guilty of laches in demanding a renewal, equity will not, in general, aid him.⁶ Circumstances may in particular cases, excuse the laches; but generally the lessor cannot continue bound by his covenant, where the lessee has neglected to perform the conditions with which it was coupled. There would be no mutuality in such dealing, if it were left to the option of the

¹ Gorton v. Smart, 1 Sim. & S. 66.

⁵ Robertson v. St. John, 2 Bro. Ch.

² Tracy v. Albany Exch. Co. *supra*, 5 B. & A. 584.

140; Richardson v. Sydenham, *supra*.

³ Redshaw v. Bedford Level, 1 Eden, 346.

⁴ Dowling v. Mill, 1 Madd. 641.

⁶ Eaton v. Lyon, 3 Ves. 690; McAlpine v. Swift, 1 Ball & B. 285; Renoud v. Daskam, 34 Conn. 512.

lessee alone to enforce the contract when he pleased, but to leave himself free as long as he found it convenient.¹ The court will only interfere beyond the stipulations of a covenant, where a literal performance has been prevented by unavoidable accident, fraud, surprise, or ignorance not wilful, and upon compensation being made and no injury done to the lessor.² Accordingly, where an original lessee, with a covenant for renewal, died, and the instrument came into the possession of his executor, who was ignorant of the covenants of the lease, and that his testator was one of the lives named therein, until apprised of it by his solicitor; the court were of opinion that such ignorance of the contents of the lease did not entitle the plaintiff to seek relief in a court of equity, or absolve him from the effect of omitting to apply for a renewal in time.³ So when it appeared that the assignee of the lease did not know of the death of the *cestui que vie*, but accounted for his ignorance on the ground that the description in the lease, of the residence and trade of the person, did not correspond with his actual residence and trade at the time of his decease; and, therefore, though the owner of the lease knew of the death of this person, but was mistaken as to his identity, and immediately upon his receiving information on the subject applied for a renewal; the Master of the Rolls, Sir J. Leach, thought that these circumstances did not entitle the plaintiff to relief in equity upon the principle that a lessee was bound to inform himself correctly as to the lives, and make application within the prescribed period.⁴

§ 340. The *legal effect of taking* a new lease is a surrender of the old one; but a renewed lease is to be considered as a continuance of the original lease, for the protection of all legal interests carved out of it, which, when once well created, the law does not permit to be destroyed.⁵ It was formerly considered necessary to obtain the concurrence of all the under-lessees to a surrender of their exist-

¹ London v. Mitford, 14 Ves. 41.

² Eaton v. Lyon, *supra*; Baynham v. Guy's Hosp. 8 Ves. 295; Rawstorne v. Bentley, 4 Bro. Ch. 415. But see Maxwell v. Ward, 11 Price, 16, the opinion of Lord C. B. Richards.

³ Maxwell v. Ward, 13 Price, 676.

⁴ Harris v. Bryant, Rolls, 10 Dec. 1827, cited Platt on Covenants, 263.

⁵ Collett v. Hooper, 13 Ves. 260. Where new leases are regarded as a continuance of the original term, as in the case of church

leases, a mortgage of the leasehold premises attaches to a continuance of the lease. Gibbes v. Jenkins, 3 Sandf. Ch. 180. The acceptance by a lessee of a renewal of the lease is no satisfaction of a breach of the lessor's covenant; for example, his covenant for quiet enjoyment. Lord v. Vreeland, 15 Abb. Pr. R. 122. So the continued tenancy by lessee's election is no surrender, but the obligation of all the covenants in the lease remain. House v. Burr, 24 Barb. 525.

ing interests, in order to obtain a renewal of the principal lease, and such renewal might be prevented or delayed by the refusal of one under-tenant to surrender his lease; and if there was no covenant in the under-lease to that effect the court possessed no power to compel the under-tenant to surrender.¹ The statute 4 Geo. II. c. 28, § 6, from which the section of the New York Revised Statutes before mentioned is taken, provided a remedy for such inconveniences, by enacting that, in case any lease shall be surrendered, in order to be renewed, the renewal shall be good and valid to all intents and purposes, without a surrender of any of the under-leases derived out of the original lease, allowing all the parties, however, to enjoy their rights and remedies in the same manner and to the same extent as if the original lease still continued.

SECTION VI.

THE COVENANT TO PAY TAXES AND ASSESSMENTS.

§ 341. Another obligation which the law imposes upon the landlord, when the lease is silent upon the subject, is the payment of *all State, city, and county taxes and assessments*, which during the term may become chargeable upon the premises, or any ground-rent the property may be subject to.² An express agreement is sometimes introduced into the lease, by which this obligation is shifted, and the tenant undertakes to pay them; but without such an agreement the tenant may discharge them, and deduct what he is obliged to pay out of the rent; for the general rule is, that the immediate landlord is bound to protect his tenant from all paramount claims. When, therefore, a tenant has been compelled, in order to protect himself in the enjoyment of the land, in respect of which his rent is payable, to make payments which ought as be-

¹ Colchester v. Arnett, 2 Vern. 888.

² Taylor v. Zamira, 6 Taunt. 524; Roe v. Hayley, 12 East, 469; Carter v. Carter, 5 Bing. 409; Watson v. Atkins, 3 B. & A. 647. Taxes are burdens, charges, or impositions set on persons or property for public uses; and import a contribution in money, not labor nor personal service. An

assessment for a supposed benefit is not a tax. Overseers of Amenias v. Overseers of Stanford, 6 Johns. 92; Sharp v. Speir, 4 Hill, 76; But this is only where the lease is for years. Tenant for life is bound for taxes, &c. Prettyman v. Walston, 84 Ill. 191, and *ante*, § 318, and notes.

tween himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or to become due.¹ The landlord sometimes covenants to pay a certain portion of such charges only; but, according to the English cases, he is chargeable only in proportion to the rent he receives. And where he covenanted to pay taxes, and the premises were taxed at £150, and he received only £120 for rent, the covenant was held to be satisfied by the payment of the tax at the rate of £120.² If he expressly covenants to pay all taxes charged or to be charged upon, or in respect of the land during the continuance of the term, and gives the lessee permission to build on the land, who subsequently builds, and thereby increases the annual value of the premises and with it the amount of the taxes, the landlord will be bound to pay taxes only in proportion to the value of the land without the building, and the tenant must make up the balance for the improved value.³

§ 342. The obligation of the landlord to pay all public charges against the property, except such as the tenant has expressly undertaken to pay renders him liable also to reimburse the tenant for all such payments as he has been obliged to make, to protect his goods, or the property leased, from the demands of the public collector.⁴ And where the goods of an out-going tenant, left by him on the farm, were distrained for a tax payable by the tenant, in whose time it became due, and who received the benefit of the improvement, and which the statute gave him power to deduct from his rent; the court held that, as the tax must ultimately fall on the landlord, and the tenant had been compelled to pay it, in order to ransom his goods, he might recover the amount from the landlord as money paid to his use.⁵

¹ *Graham v. Allsopp*, 8 Exch. 186; *Jones v. Morris*, *ib.* 742. By the Revised Statutes of Massachusetts, chap. 7, sec. 8, where a tenant paying rent for real estate shall be taxed therefor, he may retain out of his rent, the one-half of the taxes paid by him; and when the landlord is assessed for such real estate, he may recover one-half of the taxes paid by him and his rent in the same action against his tenant; unless there be an agreement to the contrary.

² *Yaw v. Leman*, 1 Wils. 21; and see *Watson v. Atkins*, 8 B. & A. 647.

³ *Watson v. Home*, 7 B. & C. 285. A covenant by a landlord to pay land-tax,

binds him only to pay land-tax in proportion of rent. *Whitfield v. Brandwood*, 2 Stark. 440.

⁴ *Spencer v. Parry*, 3 Ad. & E. 881; *Lubbock v. Tribe*, 3 M. & W. 607.

⁵ *Dawson v. Linton*, 5 B. & A. 521. On a lease for years, rendering a fixed sum for rent, *free and clear* from all manner of taxes, charges, and impositions whatsoever, the lessor is entitled to receive the whole rent, without any deduction for taxes, or charges of any description. *Giles v. Hooper*, Carth. 135; *Brewster v. Kidgil*, 1 Salk. 198; s. c. 1 Ld. Ray. 817. In New York, the interest of a lessee of real estate is

taxable as real property, notwithstanding that, as between heirs and executors, it is, by 2 R. S. 88, § 6, personal property. *Trustees v. Dunn*, 22 Barb. 402. Such a tax would not of course fall upon the landlord. And see *ante*, §§ 14, 50. But rents due upon leases for twenty-one years are taxable as the personal estate of the landlord, under the New York law of 1848, to equalize taxation, and such rents continue to be taxable until the end of the term, although at the time of laying the tax,

such leases have but a few years to run. And a landlord cannot evade this liability, by setting up an agreement between himself and his tenant, that a new lease shall be executed for the unexpired term. *Livingston v. Hollenbeck*, 4 Barb. 9; *Le Couteulx v. Supervisors of Erie Co.*, 7 Barb. 249; *Buffalo v. Le Couteulx* 15 N. Y. 451. Nor is there any difference, in this respect, between agricultural and city property; or whether the tax is levied for city, county, or State purposes. *Id.*

CHAPTER IX.

COVENANTS ON THE PART OF THE LESSEE.

SECTION I.

OF THE COVENANT TO REPAIR, AND HEREIN OF WASTE.

§ 343. INDEPENDENT of an express agreement, the law imposes upon every tenant, whether for life or for years, an obligation to treat the premises in such a manner that no substantial injury shall be done to them; and so that they may revert to the lessor at the end of the term unimpaired by any wilful or negligent conduct on his part. A tenant for years, or from year to year, must keep the premises wind and water tight;¹ and is bound to make fair and tenantable repairs, such as the putting of fences in order, or replacing doors and windows that are broken during his occupation.² If it is a furnished house, he must take care of the furniture, and leave it with the linen, &c., clean and in good order.³ But he is not bound to rebuild premises which have accidentally become ruinous during his occupation, unless he is under a covenant to rebuild.⁴ Neither is he liable for the mere wear and tear of the premises;⁵ nor answerable if they are accidentally burnt down; nor bound to replace doors and sashes worn out by time; to put a new roof on the building; nor to make similar substantial and lasting repairs, such as are usually called general repairs.⁶ Nor is he bound to do painting, whitewashing, or papering, which are mere matters of ornament (unless they are necessary to preserve exposed timber from decay), even though he be under a covenant

¹ *Auworth v. Johnson*, 5 C. & P. 289; *Leach v. Thomas*, 7 *id.* 327.

² *Cheetham v. Hampson*, 4 T. R. 318; 18 Ves. 331; *Ferguson v. —*, 2 Esp. 590. See *ante*, § 330, note; and *post*, § 375, note.

³ *White v. Nicholson*, 4 M. & G. 95; *Stanley v. Agnew*, 12 M. & W. 827.

⁴ *Auworth v. Johnson*, *supra*; *Bullock v. Dommitt*, 6 T. R. 650.

⁵ *Torriano v. Young*, 6 C. & P. 8.

⁶ *Leach v. Thomas*, *supra*; *Doe v. Amey*, 12 Ad. & E. 476; *Horsefall v. Mather*, Holt, 7; *Brown v. Crump*, 1 Marsh. 567. Such as renewing the floor of a stable. *Johnson v. Dixon*, 1 Daly, 178.

to leave the premises "in good and sufficient repair, order, and condition."¹

§ 344. *As to farming leases*, a tenant is also under a similar obligation to repair, but it differs from his liability to repair houses in this respect, that it extends only to the dwelling-house occupied by the tenant; the burden of repairing the out-buildings and other erections on the farm, being sustained either by the landlord or the tenant (in the absence of any express provision in the lease), by the particular custom of the country in which the farm is situated; he is, however, always bound to keep the soil in a proper state of cultivation; and to preserve the timber and ornamental trees in good order, if there be any growing on it.² The bare relation of landlord and tenant is a sufficient consideration for a promise by the tenant, to treat the farm in a husbandlike manner, and to keep the fences in repair, as well as to cultivate the lands according to the custom of the country; though not for a promise to repair, or to spend a certain amount annually for manure.³ And in an action against a tenant, upon promises that he would occupy the farm "in a good and husbandlike manner, according to the custom of the country," an allegation that he had treated the estate "contrary to good husbandry and the custom of the country," was proved, by showing that he had treated it contrary to the prevalent course of husbandry in that neighborhood; as by tilling half his farm at once, when no other farmer there tilled more than a third, though many tilled only a fourth; and it is unnecessary to show any precise definite custom or usage in respect of the quantity tilled.⁴ All these duties fall upon a tenant without any express covenant on his part; and a breach of them will, in general, render him liable to be punished for waste, without regard to the person by whom the act of waste may be committed; for it has been held, since the time of Lord Coke, that a tenant, whether for life or for years, must answer for waste done by a stranger, and must take his remedy over.⁵

¹ *Wise v. Metcalfe*, 10 B. & C. 299. It is to be observed, that there is no implied contract to use the premises in a tenant-like manner, where there is an express covenant to repair, contained in the lease, for *expressum facit cessare tacitum*. *Standen v. Christmas*, 10 Q. B. 185.

² *Herne v. Bembow*, 4 Taunt. 764; Co. Lit. 58.

³ *Brown v. Crump*, 1 Marsh. 567; s. o.

6 Taunt. 800; *Powley v. Walker*, 5 T. R. 878; *Tempest v. Rawling*, 18 East, 18; *Cheetham v. Hampson*, *supra*.

⁴ *Legh v. Hewitt*, 4 East, 154; *Dalby v. Hirst*, 8 Moore, 588.

⁵ Lord Mansfield, in *Taylor v. Whitehead*, 2 Doug. 745; *Attersoll v. Stevens*, 1 Taunt. 198, and per Beardsley, J., in *Cook v. Champl. Transp. Co.*, 1 Den. 104. At common law there was a distinction between

§ 345. *Waste is usually defined to be, a spoil or destruction in houses, lands, or tenements, to the damage of him in reversion or remainder; and may be either voluntary or permissive. It is voluntary where the tenant does some actual injury to the premises, as in pulling down or destroying a house, ploughing up a flower-garden, or the like; and permissive when he neglects to do what might have prevented the waste, as by suffering a house to fall down or decay for the want of repair. It may be incurred in respect to the soil, the buildings, trees, fences, or the live-stock on the premises.¹ It is a general principle, says Chief Justice Savage, that the law considers every thing to be waste which does a permanent injury to the inheritance; and, therefore, where the value of the land consists principally in hemlock timber growing upon it, the act of cutting such timber and peeling the bark, when such cutting is not necessary and proper for the purpose of cultivation, will be considered waste.² To open new mines, in land demised, without mention of mines; to dig and carry away the soil, dig clay, open gravel-pits, and the like (unless for the repair of the premises), are instances of voluntary waste, because these things do an injury to the inheritance.³ So is it also to cut timber; to use the soil for making brick; to change the face of the soil by*

tenants of estates created by the act of the law, and those created by the contract of the parties; the former having always been punishable for committing waste, the latter not so. Thus, tenants by the curtesy, or in dower, were always restrained from waste, while a tenant for years was not: for while it was considered a hardship if the law were to give the estate, without restraining the person to whom it was given, from doing injury to the inheritance, it was quite otherwise as to a person who had let in a tenant by express contract, and who had the power of inserting in that contract, express stipulations against the commission of waste, and had neglected to do so. This doctrine, however, was found to be very inconvenient, when carried out in practice, and the statutes, commencing with that of Marlbridge, 52 Hen. III. c. 28, restrained all tenants of particular estates from doing waste in the same manner as tenants by the curtesy and in dower had been previous to those statutes. Co. Lit. 299.

¹ Co. Lit. 58, b; 2 Rol. Abr. 816, l. 15. Voluntary waste consists in doing something which the tenant is prohibited by law from doing; while permissive waste

allows something to happen, which he is bound by law to prevent. The one is an offence of commission, the other of omission.

² The People v. Alberty, 11 Wend. 162; Jackson v. Brownson, 7 Johns. 227. In an action to recover damages for waste, the jury are to inquire, how far the acts complained of have injured the plaintiff's estate and inheritance. Harder v. Harder, 26 Barb. 409. That the test of waste is not injury to the premises, but disherison of the reversion. See Livingston v. Reynolds, 26 Wend. 115; Kidd v. Dennison, 6 Barb. 9.

³ Livingston v. Reynolds, 2 Hill, 157; Coates v. Cheever, 1 Cow. 460; Saunders' case, 5 Co. 12, a; 22 Vin. Abr. 489. When the law defines waste to be whatever does a lasting damage to the freehold or inheritance, it does not mean that it is to be left to a jury to determine according to the opinions of witnesses, whether the act complained of causes such damage; for certain acts are in contemplation of law injurious *per se* to the inheritance, and the only subject of inquiry for the jury is, whether such acts have been committed. McGregor v. Brown, 10 N. Y. 114.

converting arable land into pasture, or pasture land into arable; to turn garden ground into tillage; to sow grain in hop grounds; to plough up strawberry beds; and, in short, to essentially vary, in any manner, the quality of the soil, or the nature of its produce; for it not only changes the course of husbandry, but the landlord is thereby in danger of losing evidence of the identity of his property.¹

§ 346. But *the offence is said to consist* in the first penetration and opening of the soil; and, therefore, it is not waste to continue to dig in mines or pits already open, and which have become part of the annual profit of the land. And if mines, pits, &c., be expressly named in the lease, so as to show an intention that the lessee shall have the benefit of their produce, it will not be waste for him to open them.² Or where clay, marl, &c., are taken from the soil for the purpose of repairing the buildings or improving the land, this will not be waste.³ Neither will it be so considered to dig trenches to carry off water, or to cut turf for actual use.⁴ But any thing tending to the *destruction* of the subject of the demise is waste; as if the lessee cuts down pear, apple, or other fruit trees; or they are blown down by tempest, and he afterwards roots them up, or cuts down the growing germins, without planting new.⁵ So if he destroys, or suffers the stock of a dove-cot, warren, park, or fish-pond, to be diminished so that there is not such sufficient store left, as he found when he came in.⁶ And if he voluntarily puts repairs upon the premises, he cannot afterwards displace and remove them without committing waste.⁷

§ 347. If the tenant suffer the land to be overflowed or surrounded by water, through his negligence in permitting the em-

¹ *Livingston v. Reynolds*, 28 Wend. 122; *Watherell v. Howells*, 1 Camp. 227; *Sarles v. Sarles*, 8 Sandf. Ch. 601; *Shipley v. Ritter*, 7 Md. 406; *Clement v. Wheeler*, 25 N. H. 861; *Queen's College, Oxford v. Hallett*, 14 East, 489; 2 Rol. Abr. 816; *Harrow School v. Alderton*, 2 B. & P. 86. Besides, the tenant has no authority to assume the right of judging what may be an improvement to the inheritance; but must confine himself to the conditions of his lease. Per *Paige, J.*, in *Kidd v. Dennison*, *supra*.

² *Crouch v. Puryear*, 1 Rand. 258; *Saunders' case*, 5 Co. 12. It was further decided in this case, that if the land be leased, in which there is a hidden mine, and the lessee opens it, and then assigns over his estate, the assignee cannot dig in it; and if the lessee in such case assigns

his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, &c., the exception is void. *Doe v. Wood*, 2 B. & A. 724. Upon the principle of *Saunders' case*, it has been held in Maryland, that the opening of a new mine is waste. *Owings v. Emery*, 6 Gill, 260. This case also held that a lease of a lot of ground without any reference to mines or quarries was simply a grant of the superficies of the soil.

³ *Moyle v. Mayle, Owen*, 66.

⁴ 2 Rol. Abr. 820, l. 23; Co. Lit. 58, b; *Lord Courtown v. Ward*, 1 Sch. & L. 8.

⁵ Rol. Abr. 817, l. 35; Co. Lit. 58, a; *Lashmer v. Avery*, Cro. Jac. 126.

⁶ Co. Lit. 58, a; 2 Inst. 804.

⁷ *Caldwell v. Enkas*, 2 Mill, Const. 848.

bankments to fall into decay, he will be chargeable with permissive waste to the soil; but if the overflow or other injury be caused by a tempest, he will not be answerable for such accident, unless he omits to repair the damage.¹ If a house be destroyed by tempest, fire from lightning, or the like, which is the act of Providence, it is not waste,² for *actus Dei nemini facit injuriam*. Yet it becomes so, if the damage done by the tempest was occasioned by the tenant's previous neglect to repair, or if he does not forthwith proceed to repair.³ But if the house is in a ruinous condition when the tenant comes in, and he pulls it down, it is still waste, unless he builds it up again.⁴ And if glass windows (although glazed by the tenant himself) be broken or carried away, it is waste; for the glass is part of the house, and the tenant must, at his peril, keep the house from wasting. Waste may also be done *in respect to animals*; which happens by taking or destroying so many of them as to unstock the dove-cot, warren, park, or fish-pond, in which they are kept;⁵ or if the tenant stops the pigeon-holes, so that the pigeons cannot build, or suffers the park paling to be decayed, so that the deer stray away and are lost.⁶

§ 348. *Voluntary waste* to buildings at common law occurs not only where they are deliberately pulled down or unroofed, but also where one kind of building is altered into another, even though it be thereby improved in value; as, for instance, to alter a corn-mill into a fulling-mill; a dwelling-house into a store, or a hall into a stable;⁷ throwing two rooms into one;⁸ pulling down the house and rebuilding it upon a greater or less scale than before; or to convert a brew-house, which let for £120 per annum, into dwelling-houses, which let for £200 per annum; because, as it was said, of the alteration of the nature of the thing, and of the evidence.⁹ Besides which, it might have the effect of casting an additional

¹ Griffith's case, Moore, 62; Co. Lit. 58, b; Reg. v. Leigh, 10 Ad. & E. 398.

² Co. Lit. 58, a. But if the house was burnt by the tenant's negligence, it is still waste. Co. Lit. 58, b. Or if the roof were blown off, it would be waste unless he repaired it in a reasonable time. 2 Rol. Abr. 820.

³ Moore, 62; Viner's Abr. Waste (1).

⁴ Co. Lit. 58, a.

⁵ Vavasor's case, 2 Leon. 222; 4 id. 240.

⁶ Moyle v. Moyle, Owen, 66.

⁷ Greene v. Cole, 2 Saund. 252; s. c. 1 Lev. 309, and 1 Mod. 94; Co. Lit. 58, a; Jackson v. Cator, 5 Ves. 689. In Sweet-

ser v. Eames, 8 Dane, Abr. 238, it was held not to be waste for the lessee of a corn and grist mill, to turn the mill into one for grinding dyewoods, although the lessee took away a part of the apparatus for grinding corn, and substituted others. ⁸ 2 Rol. Abr. 816; 22 Vin. Abr. 489; London v. Greyme, Cro. Jac. 181.

⁹ Bonnett v. Saddler, 14 Ves. 526. Alterations of the house demised are not of course waste, when made without the concurrence of the lessor, unless they are prejudicial to the estate. Jackson v. Tibbits, 8 Wend. 841. An injunction was granted to prevent a lessee from altering

obligation on the reversioner, which he might not consider an improvement. It was therefore considered incompatible with his interest for a tenant to make any such alterations unless he was justified by the express permission of his landlord. But this strictness of the common law has been essentially modified in this country, and, as now understood, it is no waste for the tenant to erect a new edifice upon the demised premises, if it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. He has no right, indeed, to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to make it impossible for him to restore the premises substantially at the expiration of the term; but to apply the ancient doctrine of waste to modern tenancies, even for short terms, would, in some of our cities and villages, put an entire stop to the progress of improvement, and deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion.¹

§ 349. *Permissive waste* to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by neglecting to cover the house; or suffering the walls to fall into decay for want of plastering;² or the foundation to be injured by neglecting to turn off a stream of water.³ So if the house or other erection on the premises is destroyed by fire, through the carelessness or negligence of the tenant, it is waste, and he must rebuild in a convenient time, at his own expense. The statute before adverted to, only guards a tenant from the consequences of a misfortune of this kind in case the casualty has been purely accidental.⁴ Merely suffering the house to remain unroofed (provided it was so at the commencement of the lease) will not be considered waste; but the tenant must take the consequences of any other part thereby becoming ruinous or decayed.⁵ To permit walls built to exclude water to remain in such a dilapidated condition as to cause the lands to be overflowed and injured, is waste; but not if it be suddenly surrounded by the violence of the sea, as by a tempest,

a dwelling-house into a warehouse. *Douglas v. Wiggins*, 1 Johns. Ch. 485; *Lathrop v. Marsh*, 5 Ves. 280, and note; *Grey de Wilton v. Saxon*, 6 *id.* 106.

¹ *Winship v. Pitts*, 3 Paige, 259.

² Co. Lit. 58, a; 2 Rol. Abr. 815, l. 81.

³ *Sticklehorne v. Hatchman*, Owen, 48.

⁴ Co. Lit. 58, b; *Rook v. Warth*, 1 Ves. sr. 462.

⁵ 2 Rol. Abr. 818, l. 1.

without any fault of the tenant.¹ And though the destruction of a house by lightning, tempest, or a public enemy, is not waste, to suffer it to remain ruined will be so.² Its destruction by a mob is waste.³

§ 350. Not only the local custom, but the particular circumstances of the case, must be taken into the account, in determining whether the cutting of any given wood is waste or not. To destroy a wood of willows or hazels is waste; but cutting willows and hazels in a wood of oak, which are underwood, is no waste.⁴ But to cut trees that are not timber, and which are growing in defence of, or to ornament the house, or fruit trees growing in an orchard or garden, will amount to waste.⁵ In determining the question whether trees appertaining to a dwelling-house are ornamental trees or not it is important to ascertain whether they have been considered and treated as such by the owner of the premises.⁶ Cutting willows which grew on the bank of a river, by which the bank fell down, and a meadow adjoining was overflowed, was held to be waste.⁷ But cutting a ditch from the Mohawk River, and diverting it from its channel so as to overflow a swamp covered with timber, by means of which the timber died, was held to be no waste, when it appeared that a new and better growth of timber had sprung up which, in the opinion of the witnesses, was worth more than the old timber.⁸ The general property *in trees* that are timber is in the owner of the inheritance of the land on which they grow; that in the bushes and underwood is in the tenant.⁹ Accordingly, if trees, being timber, are blown down by the wind, or severed by a trespasser they belong to the lessor, and not to the tenant for life or years, for they are part of the inheritance.¹⁰ But if trees not fit for timber are cut down by the lessor, the property in such trees is vested in the tenant; for the lessor would have no right to them if severed by the act of God, and, therefore, can have no right to them, where they have been severed by his own wrongful act; and

¹ Griffith's case, Moore, 69.

² Co. Lit. 58, a.

³ White v. Wagner, 4 Har. & J. 373.

⁴ Bro. Waste, pl. 21.

⁵ Co. Lit. 58, a, b.

⁶ Hawley v. Wolverton, 5 Paige, 522.

Trees on a highway, not needed for its construction or repair, belong to the owner of the soil. 1 N. Y. R. S. 525, § 126.

⁷ Sir G. Stripling's case, 22 Vin. Abr. 449, pl. 11.

⁸ Jackson v. Andrew, 18 Johns. 431.

⁹ Per Tindal, C. J., in Berriman, v. Peacock, 9 Bing. 386. A sale of standing trees by parol is a sale of an interest in land, and void by the statute of frauds. Per Edwards, J., in McGregor v. Brown, 10 N. Y. 114.

¹⁰ Ward v. Andrews, 2 Chit. 636; Mooers v. Waite, 3 Wend. 104.

the same rule holds where they have been severed by a stranger.¹ What constitutes timber depends much upon the custom and opinion of the place where it is situated ;² but it is said that trees must be at least twenty years old to constitute timber, and must also be fit for building purposes.³

§ 351. A tenant, however, whether for life or for years, may lawfully cut timber trees for the necessary repairs of the house and fences, even though he has agreed to repair at his own charge ;⁴ but then it must be for the repair of such buildings as were on the premises when he entered into possession, and not for such as he may have subsequently erected.⁵ And he is entitled to take reasonable *estovers*, that is wood from the land, for fuel, fences agricultural erections, and other necessary improvements. Nor is it absolutely necessary that such firewood be used on the premises provided it is taken in good faith for the use of the tenant and his servants, in reasonable quantities, and the inheritance is not injured.⁶ If the house be destroyed or injured by an accidental fire, the tenant may cut timber to rebuild it ; but he cannot cut timber to build a new house or new fences where none were before.⁷ It must, moreover, be for repairs which are presently needed, and not for such as are only likely to become necessary ;⁸ nor for such as have been occasioned by his own negligence ; for if the tenant suffer the buildings to fall into decay, and then cut timber to repair them he will be guilty of double waste.⁹ And if a lessee is authorized by his lease to cut wood for fuel or fencing, he must comply substantially with the conditions of his lease. He cannot omit for years to take firewood and fencing timber from the premises, suffering the wood proper for those uses to be destroyed and wasted, and then, by way of compensation or indemnity, enter upon the premises, and take timber and wood to which the lease gives him no right.¹⁰

§ 352. The timber must be absolutely and *immediately employed in the repairs* for which it was cut ; for if the tenant cut down tim-

¹ Channon v. Patch, 5 B. & C. 897 ; 2 Chit. 686.

² Co. Lit. 58, a ; Kidd v. Dennison, *supra*.

³ Duke of Chandos v. Talbott, 2 P. Wms. 606.

⁴ Moore, 28 ; Co. Lit. 54, b ; Harder v. Harder, 26 Barb. 409.

⁵ Co. Lit. 58, a ; 41 b.

⁶ Gardiner v. Dering, 1 Paige, 578 ; Co. Lit. 41, b.

⁷ Davey v. Asquith, Hob. 238.

⁸ Gorges v. Stanfield, Cro. El. 598.

⁹ Padelford v. Padelford, 7 Pick. 152 ; Co. Lit. 58, b ; 2 Rol. Abr. 822, l. 38 ; Conner v. Shepherd, 15 Mass. 164.

¹⁰ Clarke v. Cummings, 5 Barb. 339.

ber and sell it, and out of the proceeds repair the house,¹ or if he sell it, and afterwards buy it again, and then use it for repairing, he will, in either case, be guilty of waste, for the selling of the trees is waste.² It is so, also, if he cut timber for the purpose of necessary repairs, but it turns out to be unfit for that purpose, and he then exchanges it for other timber, which was applied to the repairs; for the tenant must, at his peril, select such trees as are fit for the purpose and employ them accordingly.³ But in Massachusetts the court held that it was not waste, in a tenant for life, to cut down timber trees to repair, and sell them to procure boards for the purpose, if that mode of exchange was most beneficial for the estate.⁴ And whether trees have been cut *bonâ fide* for the purpose of repairing, is always a question for a jury.⁵ Although a tenant may cut firewood for his own use, he may take none to sell, nor any more than is reasonable; nor can he cut any, so long as there is sufficient dead wood on the premises for his consumption.⁶ He may, however, cut timber trees that are dead, and such trees as are neither timber, nor grow in defence of the house.⁷ But he may go no further than cutting; for, if he grub up trees, hedges, or underwood, he is guilty of waste.⁸ But when thorns, bushes, furze, or the like, are growing in pasture or arable lands, the tenant may lawfully stub them up, for this is good husbandry and not waste.⁹

§ 353. The law of waste accommodates itself to the varying wants and conditions of different countries; that may not be waste, for example, in an entire woodland country, which would be so in a cleared one. A clearing of land in a new country would not be a lasting damage to the inheritance, nor a disinheritance of him in remainder, which is the true definition of waste. It would, on the contrary, be beneficial to him in remainder, so long as a sufficiency of timber was left, and the land cleared bears a proper relative proportion to the whole tract.¹⁰ And it has been held, that, if the

¹ Vin. Abr. Waste (M.), pl. 1, note.

² Co. Lit. 58, b; Doe v. Wilson, 11 East, 56.

³ Simmons v. Norton, 7 Bing. 640.

⁴ Loomis v. Wilbur, 5 Mass. 18.

⁵ Doe v. Wilson, *supra*.

⁶ Simmons v. Norton, *supra*; Archdeacon v. Jennor, Cro. El. 604; 7 Bac. Abr. 262.

⁷ Gage v. Smith, 2 Rol. Abr. 817, l. 17.

⁸ Lashmer v. Avery, Cro. Jac. 126.

⁹ Maleverer v. Spinke, Dyer, 87, a.

¹⁰ Findlay v. Smith, 6 Munf. 184;

Crouch v. Puryear, 1 Rand. 258; Den v. Kinney, 2 South. 552; McCracken's Heirs v. McCracken's Ex'rs, 6 T. B. Monr. 842; Hastings v. Crunckleton, 8 Yeates, 261. When a farm, consisting mainly of woodland, is leased for agricultural purposes, the lessee is justifiable in felling the timber, to fit the land for cultivation, leaving a sufficient quantity for all the purposes of the farm, and the property of the timber cut is in the lessee. But, if he cut trees for sale, and not for the purpose of preparing the land for cultivation, it is waste.

cleared land on the estate was old and worn, and the proportion of woodland such that a prudent farmer would have considered it best to reduce a portion of it to cultivation, thereby to relieve the old land from excess of culture, and thus enhance the value of the estate: such clearing would not be waste, provided sufficient timber for the permanent use of the estate was left.¹ As to woodlands, also, Haywood, J., in a North Carolina case, against a tenant for life, defines waste to be "an unnecessary cutting down and disposing of timber, or destruction thereof, upon woodlands where there is already sufficient cleared land for the tenant's cultivation, and over and above what is necessary to be used for fuel, fences, plantation, utensils, and the like."² But where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation. He may not, however, cut so much as to injure the inheritance; but to what extent he may go, without committing waste, is a question for a jury to determine in each particular case.³ If he cuts the trees merely for the sake of profit to be derived from a sale of the timber, and not for the purpose of preparing the land for cultivation, he is clearly guilty of waste. And although he may, from the commencement of his term, gradually clear

Kidd v. Dennison, 6 Barb. 9; People v. Davison, 4 id. 109.

¹ Owen v. Hyde, 6 Yerg. 334; Loomis v. Wilbur, 5 Mason, 13; Parkins v. Cox, 2 Hayw. 339. In this country, no act of a tenant amounts to waste, unless it is prejudicial to the inheritance. Pyncheon v. Stearns, 11 Metc. 304.

² Ballentine v. Poyner, 2 Hayw. 110; Wilson v. Smith, 5 Yerg. 379. In New York, where fifteen months is allowed for the redemption of land sold under an execution, before the creditor is entitled to take possession, the statute declares that certain acts of the occupant shall not amount to waste. Any person entitled to the possession of lands or tenements, sold under execution, may, until the expiration of fifteen months from the time of such sale, use and enjoy the same as follows, without being guilty of waste: 1. He may, in all cases, use and enjoy the premises sold, in like manner, and for the like purposes, in and for which they were used and applied prior to such sale, doing no permanent injury to the freehold. 2. If the premises sold were buildings, or any other erections, he may make necessary repairs thereto, but he shall make no alterations in the form or structure thereof. 3. If

the premises sold were land, he may use and improve the same in the usual course of husbandry, but he shall not be entitled to any crops growing thereon at the expiration of the said fifteen months. 4. He may apply any wood or timber on such land to the necessary reparation of any fences, buildings, or erections, which may have been thereon at the time of the sale. 5. If the land sold is actually occupied by such person, he may take necessary firewood therefrom for the use of his family. 2 R. S. 336, § 21.

³ Jackson v. Brownson, 7 Johns. 227; Adams v. Brereton, 3 Har. & J. 124. The New-York Court of Appeals hold that the cutting of trees by a tenant for years, except under special circumstances, is waste; and that in an action by a landlord for such waste, evidence of a parol consent by the landlord to the cutting of the trees, on condition that the tenant would clear and seed down the land where the trees were cut, is not admissible; such consent being a mere license, and requiring a writing to give it validity. And the opinions of witnesses, that such acts were not injurious to the inheritance, and therefore not waste, are inadmissible. McGregor v. Brown, 10 N. Y. 114.

up the woodland and prepare it for cultivation, yet he will not be permitted, just before the expiration of his lease, to cut down timber upon that pretext.¹ Where land is annexed to a furnace cutting wood sufficient for the supply of the furnace was held in New Jersey to be no waste;² while in North Carolina it was held waste to cut down light-wood for tar.³

§ 354. When the tenant commits *waste, by felling timber* or houses, they still remain the property of the person who is entitled to the inheritance; for the tenant had them as things annexed to the soil, and it would be absurd that when, by his own act and wrong, he severs them from the land, he should gain a greater property in them than he had before.⁴ And whether they were felled by the tenant or other person, or blown down by a tempest, the lessor is entitled to them, in respect to his general ownership, and because they were his inheritance.⁵ So also sea-weed thrown by the sea upon the beach, vests in the owner of the soil as much as the wood, grass, or any other thing appurtenant to the ownership of the soil; though, as between landlord and tenant, the latter, doubtless, would be allowed to make use of it, unless it had been expressly reserved by the lease.⁶

§ 355. Sometimes a clause is inserted in the lease, that a tenant shall have the lands *without impeachment of waste*; this expression is equivalent to an authority to commit waste, and, at common law, authorized him to cut timber, or open new mines and convert the produce to his own use.⁷ But if the words were, *without impeachment of any action of waste*, they only gave the tenant a discharge from the action, but not the property in the thing granted.⁸ Equity, however, gives a more limited construction to the first clause, and

¹ *Kidd v. Dennison*, 6 Barb. 9; *Livingston v. Reynolds*, 26 Wend. 122; s. c. 2 Hill, 157.

² *Den v. Kinney*, 2 South. 552.

³ *Parkins v. Cox*, 2 Hayw. 389. The American doctrine, on the subject of waste by cutting timber, undoubtedly differs from the English, in consequence of the differing circumstances of the two countries. In England, timber is an object of extraordinary care, while in the United States, particularly in former years, it was desirable to get rid of it. It was therefore said, that it would be an outrage on common sense, to suppose, that what would be deemed waste in England, would receive that appellation here: and that if a tenant in dower clears part of the land assigned

to her, and does not exceed the relative proportion of cleared land, considered in reference to the whole tract, she cannot be said to have committed waste thereby. *Hastings v. Crunckleton*, 3 Yeates, 261.

⁴ *Mooers v. Wait*, 3 Wend. 104; *Kidd v. Dennison*, *supra*.

⁵ *Bulkley v. Dolbeare*, 7 Conn. 282; *Liford's case*, 11 Co. 48, a; *Bewick v. Whitfield* 8 P. Wms. 266; 1 Cox, 72; *Shult v. Barker*, 12 S. & R. 272; *Elliott v. Smith*, 2 N. H. 430.

⁶ *Emans v. Turnbull*, 2 Johns. 322.

⁷ *Pyne v. Dor*, 1 T. R. 55; *Williams v. Williams*, 15 Ves. 425; Co. Lit. 220, a; *Bowles' case*, 11 Co. 81, b.

⁸ *Ib.*; *Vane v. Lord Barnard*, 1 Salk. 161; 22 Vin. Abr. 505.

allows the tenant for life those powers only which a prudent tenant in fee ought to exercise. He cannot, therefore, pull down or dilapidate houses, destroy pleasure-grounds, or prostrate trees planted for shelter.¹ But a tenant for life, without impeachment of waste, is liable, on his express covenant, to repair, notwithstanding such a covenant is inconsistent with his estate; for where a man expressly covenants to do an act, which he would not otherwise be bound by law to perform, public policy requires that his contract should be strictly observed; and he cannot, in general, be relieved from the responsibility he has imposed on himself by his own deliberate act.²

§ 356. Not only is waste prohibited by law, but it calls upon the tenant, in addition, to cultivate the lands in a husband-like manner, conformably to the usual and reasonable custom of the country.³ This, however, extends only to the usual course of cultivation, and not to any extraordinary mode of agriculture.⁴ In this, as in other cases, the parties may, of course, stipulate in what manner, and to what extent, the land shall be cultivated; but unless such stipulation is made, the parties are to be governed by the usual practice and custom of the neighborhood.⁵ A tenant who has agreed to deliver up all the trees standing in an orchard at the time of the lease, reasonable use and wear only excepted, is not prevented from removing trees which are decayed and past bearing, from a part of the orchard which was overstocked.⁶

§ 357. When a tenant is under an *express covenant* to repair the premises, he is liable to make good all losses and must even rebuild in case of casualty by fire or otherwise.⁷ Being annexed to the demised property, and forming part of it, this covenant runs with the land, and binds an assignee, although not named.⁸ It is also divisible, charging an assignee of part only of the premises;⁹ and the general covenant extends as well to buildings erected by

¹ Vane v. Lord Barnard, 2 Vern. 788; 2 Eq. Cas. Abr. tit. Waste, pl. 8; Packington's case, 8 Atk. 215.

² Chesterfield v. Bolton, Com. 627; Barker v. Thorold, 1 Saund. 47.

³ Powley v. Walker, 5 T. R. 373. The remedies for waste, both preventive and compensatory, are discussed in another part of our work, commencing at § 686.

⁴ Brown v. Crump, 6 Taunt. 300.

⁵ Doe v. Crouch, 2 Camp. 449.

⁶ Legh v. Hewitt, 4 East, 154; Wigglesworth v. Dallison, Doug. 201; Webb v. Plummer, 2 B. & A. 746.

⁷ Cline v. Black, 4 McCord, 431; Ross v. Overton, 3 Call, 309; Pym v. Blackburn, 3 Ves. 38; Digby v. Atkinson, 4 Camp. 275; Phillips v. Stevens, 16 Mass. 238; Beach v. Crain, 2 N. Y. 86. A subsequent parol promise to pay is void, as without consideration. Speckels v. Sax, 1 E. D. Smith, 253. Otherwise, if made upon a new and sufficient consideration. Post v. Vetter, 2 E. D. Smith, 248.

⁸ Spencer's case, 5 Co. 16; Dean & Chapt. of Windsor's case, 5 Co. 24, a; Keeling v. Morrice, 12 Mod. 371.

⁹ Congham v. King, Cro. Car. 221.

the tenant, as to those originally demised.¹ And if the terms are clearly defined, and the agreement is so distinct that the court can describe the building, a specific performance of this contract will be decreed.² If a lessee who has erected fixtures, for the purpose of trade upon the demised premises, afterwards takes a new lease, to commence at the expiration of his former one, which new lease contains a covenant to repair he will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass, under the general words of the second demise; though it is doubtful whether any circumstances, outside of the deed, can be alleged to show that they were not intended to pass.³

§ 358. Under a *general covenant to repair*, the tenant is to take care that the tenement does not suffer more than the usual operations of time and nature will effect; but he is not bound to go further. He is only to keep an old house as an old house; he is not obliged to put in new floors, or the like, but merely to repair the old ones, although a new floor might be the more substantial way of making the repair.⁴ But under a covenant to *substantially repair or uphold* the house, the tenant is bound to keep up the inside painting.⁵ Breaking glass has been held to be a breach of this covenant, so has the leaving a pavement out of repair; for such things are within the intention of the covenant, and belong to the building.⁶ Upon the like principle, it has been determined that carrying away the locks and keys of a cupboard, or its shelves, will constitute a breach: or breaking the wall of a house, for the purpose of making a doorway into the adjoining house.⁷ So, where

¹ *Dowse v. Cale*, 2 Vent. 126; *Brown v. Blunden*, Skin. 121.

² *Mosely v. Virgin*, 3 Ves. 184.

³ *Thresher v. London Water Works Co.*, 2 B. & C. 608.

⁴ Per Tindal, C. J., in *Harris v. Jones*, 1 Mood. & R. 173; *Stanley v. Towgood*, 8 Bing. N. C. 4; *Gutteridge v. Munyard*, 7 C. & P. 129. These cases establish, that where there is a general covenant to repair, the age and condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one. See also, *Mantz v. Goring*, 4 Bing. N. C. 451. But where the tenant covenants to keep the premises, and to deliver them up,

at the expiration of the tenancy, in good repair, order, and condition, he is bound to put them into good repair, and is not justified in keeping them in bad repair, because he found them in that condition. Even in this case, however, the extent of the repairs is to be measured by the age and class of the buildings. *Payne v. Haine*, 16 M. & W. 541. So *Easton v. Pratt*, 2 Hurlst. & C. 676. In *Doe v. Rowland*, 9 C. & P. 784, however, where the covenant was to repair, and if necessary rebuild, the court refused to allow the age of the buildings to be considered; but, *quære*, if this is not overruled by the cases *supra*.

⁵ *Monk v. Noyes*, 1 C. & P. 265.

⁶ *Pyot v. Lady St. John, Cro. Jac.* 329; s. c. 2 Bulst. 102.

⁷ *Doe v. Jackson*, 2 Stark. 298.

the plaintiff granted to the defendant a right of way over his land, and covenanted to erect a gate at the terminus, the defendant, on his part, covenanting to make all the necessary repairs to said gate: it was held that the defendant was bound to replace the gate, the same having been removed by some unknown person.¹

§ 359. With respect to the breach of this covenant, the usual question is, whether the premises have been kept in substantial repair, as opposed to claims for fancied injuries; such as a crack in a pane of glass, or the like. And, with a view to a determination of this question, the jury may inquire whether the premises were new or old at the time of the demise, and be regulated in their verdict accordingly.² If, however, a lessee covenants to support and maintain the brick walls belonging to the premises, and he pulls down a brick wall which divides a front court-yard from another court at the side of the house, it will amount to a breach.³ But an enlargement of windows, opening external doors, and taking down partitions, is not a breach of the covenant to repair and keep in repair a dwelling-house, with all buildings, improvements, and additions, set up or made by the lessee.⁴ Nor is a tenant bound, under this covenant, to be at the expense of renewing the work in an improved or more durable manner than before.⁵

§ 360. While as will be seen, a lessee will not be excused by an *act of God* from the performance of any express covenant he has entered into for any act which it is conceivably in his power to perform; yet if he covenants to keep the premises in the *same state* in which they were when he took them, and trees are blown down, this covenant is not thereby broken; for it has by the act of God become impossible to keep this part of the covenant.⁶ But the case is different if he cut the trees himself, for he then breaks the covenant by his own act. There is a difference, also, with respect to buildings; for whether these be destroyed by the act of God by

¹ *Beach v. Crain*, 2 N. Y. 86.

² *Stanley v. Towgood*, *supra*; *Burdett v. Withers*, 7 Ad. & E. 186.

³ *Doe v. Bird* 6 C. & P. 195.

⁴ *Doe v. Jones*, 4 B. & Ad. 126.

⁵ *Soward v. Leggatt*, 7 C. & P. 618.

The term *habitable repair* means a state of repair reasonably fit for the occupation of an inhabitant. Where a tenant leases premises out of repair, and agrees to put them into *habitable repair*, this implies that he is to put them into a better state than that in which he found them. Bel-

cher *v. McIntosh*, 8 C. & P. 720. And a tenant is still bound to repair, although the agreement, as to the duration of the term, may be void under the statute of frauds. *Richardson v. Gifford*, 1 Ad. & E. 52.

⁶ *Main's case*, 5 Co. 20, b; *Shep. Touch.* 178. Where a tenant undertakes to keep the premises in good and sufficient repair, he is entitled to show at the trial, what the state of the premises was at the time of the demise. *Burdett v. Withers*, 7 Ad. & E. 186.

negligence, or design, the covenant will still remain binding, and the tenant will be guilty of a breach of it by failing to restore them, for this is clearly within his power.¹ If he undertakes to keep the house in as good repair as when he took it, *fair wear and tear excepted*, he is not entitled to quit upon its becoming uninhabitable for want of repair during the term, nor is the landlord under any implied obligation to make repairs in such case.² Neither will the fact that the act of waste was committed by a stranger form any excuse for the tenant, the law in such case gives him a remedy over, but makes him responsible in the first instance. As where a lessee for years covenanted that the buildings which he should erect should, at the expiration of the term, revert to the lessor "without damages of any kind, except the natural wear of the same," and a building so erected was destroyed by the negligent acts of a third party; it was held to be waste, for which the tenant was responsible to the lessor, and that the lessee or his assignee might recover in an action against the party guilty of the negligence, the value of the building.³

§ 361. When a man covenants to keep buildings in repair during the term, and he pulls them down, or suffers them to decay, or omits to make necessary repairs, he is immediately guilty of a breach of this covenant, and an action may be maintained against him by the landlord before the term has expired.⁴ If the covenant had been merely to leave the premises in good repair, it would have been otherwise, for there could have been no breach during his occupation.⁵ And if he covenants to repair and leave them in as good state as he found them, and then pulls them down, he is not guilty of a breach of the covenant, for he may rebuild them before he leaves; and therefore no action will lie against him until the end of the term.⁶ A covenant to repair *forthwith*, must receive a

¹ Brecknock Canal Co. v. Pritchard, 6 T. R. 750; Compton v. Allen, Style, 162.

² Arden v. Pullen, 10 M. & W. 821. If a lease contains a covenant by a lessor to put in repair, and a covenant by the lessee to keep in repair, the performance of the former is a condition precedent to requiring performance by the latter. Coward v. Gregory, Law Jour. N. S. C. P. 1.

³ Cook v. Champl. Transp. Co. 1 Den. 91; 4 Kent, Com. 77.

⁴ Luxmore v. Robson, 1 B. & A. 584; Shep. Touch. 178. So Doe v. Rowlands, 9 C. & F. 784; Gange v. Lockwood, 2

Fost. & F. 115. So where lessee covenanted to "maintain in repair;" Buck v. Pike, 27 Vt. 529; and the measure of damages is not the cost of repairing, but the injury done to the reversion. *Ib.*; Smith v. Peat, 9 Exch. 161; Turner v. Lamb, 14 M. & W. 412. But where the covenant is also to deliver up at the end of the term, or to keep in repair and leave as found, no action is maintainable before the end of the term. Atkins v. Chilson, 9 Metc. 52, 63; 40 Edw. III. 5; cited 5 Barb. 676.

⁵ Schieffelin v. Carpenter, 15 Wend. 409.

⁶ The mere removal and sale by a ten-

reasonable construction, and is not limited to any specific time.¹ If, therefore, a man covenants to keep a house in repair, and it becomes ruinous by accident, the covenant will not become broken till after a convenient time for its repair has elapsed. And if he engage to repair it before a particular day and it be rendered impossible, by the act of God to make the repairs by that day, there is no breach of the covenant, if he repair it as soon as possible thereafter: but the repairs must be made during the term, for, if the tenant enters for that purpose after the expiration of the term, he is a trespasser.² Where there was a lease for a year of a meadow bounded on one side by a river, and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiture of a sum of money; and afterwards, by a sudden and violent flood, the banks were destroyed the lessee was excused from the penalty, because it was the act of God, which could not be resisted; but he was held bound to repair the banks in a convenient time because of his covenant.³

§ 362. Where a lease contains a general covenant to keep the premises in repair, *with a clause of re-entry*, for a breach of covenant, and a further covenant that the tenant shall, within a certain time, from notice, being served upon him by the landlord, repair all defects specified by the notice, the first covenant will not, in general, be held to be restrained by the latter.⁴ And it has been held that a covenant by the lessee to leave the premises in repair, and a covenant that the lessor might direct the lessee to complete the repairs, by giving six months' notice in writing, were distinct and separate covenants, and that the former was not qualified by the latter.⁵ But where a lessee covenanted to repair the premises at all times, as often as need should require, and, at furthest,

ant during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of the covenant to repair, and uphold the premises, and deliver them up at the end of the term with all things affixed thereto. *Doe v. Davis*, in English Court of Common Pleas, January 15, 1851.

¹ *Doe v. Sutton*, 9 C. & P. 706.

² *Shep. Touch.* 178; *Compton v. Allen*, *Style*, 162. *Main's case*, 5 Co. 21.

³ *Dyer*, 88, a; *Walton v. Waterhouse*, 2 Saund. 420, n. (2). Covenant to take down houses within a certain term and erect new ones, may be complied with

by completely and substantially repairing without taking down. *Evelyn v. Raddish*, 7 Taunt. 411.

⁴ *Roe v. Paine*, 2 Camp. 520; *Doe v. Meux*, 4 B. & C. 606; *Doe v. Lewis*, 5 Ad. & E. 277. So it was held in *Kling v. Dress*, 5 Rob. N. Y. 521, that a covenant to repair with a clause of re-entry for breach is not qualified by a covenant to deliver up in the same repair as when taken, damages by elements excepted. But in *Ball v. Wyeth*, 8 Allen, 275, a covenant to repair was held qualified by a covenant to quit and deliver up, &c., wear and tear and casualties excepted.

⁵ *Wood v. Day*, 7 Taunt. 646.

within three months after notice, it was held to be one entire covenant, the former part of which was qualified by the latter.¹ A tenant holding over after the expiration of his term, impliedly holds subject to all the covenants in the lease which are applicable to his new situation; and, therefore, if after the expiration of a written lease containing a covenant by the lessee to keep the premises in repair, he verbally agrees to continue tenant, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, and the premises afterwards become ruinous by accidental fire, he is bound to repair them. And a mere advance in the amount of rent to be paid makes no difference, for the advanced rent incorporates the old terms with the new contract, the parties still being supposed in other respects to have had reference to the old lease; and there is an implied *assumpsit* raised by the continual holding, though an action would not lie on the covenant.²

§ 363. The same principle applies to a void lease, and the tenant is still bound by a covenant to repair, although the agreement under which he holds is void, or contrary to the statute of frauds. Thus, where a lease was granted by a tenant for life under a power, containing a covenant to repair, but not made in accordance with the power, and the lease was assigned to the defendant, who, after the death of the tenant for life, when the lease would determine, continued to pay rent to the remainder-man, for a short period: the premises being left out of repair, the landlord brought an action for damages against such assignee, on an implied *assumpsit* to repair; and it was held he was entitled to recover up to the end of the term mentioned in the lease, on the ground that the tenant was liable to all the stipulations contained in the lease in the same way as a tenant is who holds over after the determination of the lease. But if a breach of the covenant to repair takes place during the continuance of the lease, persons claiming under the lessee, and coming into possession after the determination of the lease, will not be liable on an implied promise, to restore the premises to the same state in which they were at the commencement of the original lease.³

¹ *Horsfall v. Testar*, 7 Taunt. 885.

² *Digby v. Atkinson*, 4 Camp. 275; *Kimpton v. Eve*, 2 Ves. & B. 858; *Brudnell v. Roberts*, 2 Wils. 148.

³ *Beal v. Saunders*, 3 Bing. N. C. 850;

Johnson v. Hereford Church-wardens, 4 Ad. & E. 520. Breaking a doorway through the wall of the demised premises into the adjoining house, and keeping it open for a long time, is a breach of cov-

§ 364. Under an express covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and even if the premises are entirely consumed, he is still bound to repair within a reasonable time.¹ And the principle applies to all damages occasioned by a public enemy, or by a mob, flood, or tempest.² Thus whether the covenant is to repair, or to repair, uphold, and support, or however phrased, if it undertakes the duty of repair, it equally binds the lessee to rebuild if the premises are destroyed.³ For this reason, and in order to afford some protection to the tenant, it is customary to introduce into the covenant to repair, an exception against accidents by fire, tempest, or lightning.

§ 365. We have seen that this is a covenant running with the land, binding upon the assignee of the reversion; it may also be apportioned among the assignees of different parts of the reversion.⁴ An equitable assignee is also liable in equity to the lessee to repair all damages which have occurred during the occupation of the former;⁵ and an assignee by way of mortgage is equally liable though he never takes possession.⁶ Until recently, a mere depositary of a lease by way of mortgage, whether he had entered into possession of the premises or not, was compelled to take an actual assignment, and so clothe himself with the legal estate and

enant to repair. *Doe v. Jackson*, 2 Stark. 298. But in a long lease this covenant is not broken by the tenant's making alterations. *Doe v. Jones*, 4 B. & Ad. 128.

¹ *Bullock v. Dommitt*, 6 T. R. 650; *Phillips v. Stevens*, 16 Mass. 288; *Pym v. Blackburn*, 8 Ves. 88; *Walton v. Waterhouse*, 2 Saund. 420, n. (2); *Chesterfield v. Bolton*, Com. 627.

² *Paradine v. Jane*, Aleyn, 26; *Bullock v. Dommitt*, *supra*; *Phillips v. Stevens*, *supra*; *Bohannons v. Lewis*, 3 T. B. Monr. 370.

³ *Beach v. Crain*, 2 N. Y. 86. Thus where it was to "keep in repair, and leave as found," *Phillips v. Stevens*, 16 Mass. 288; *Pym v. Blackburn*, 8 Ves. 84, 88; *Bigelow v. Collamore*, 5 Cush. 281; to "deliver in tenantable repair," *Ross v. Overton*, 3 Call, 309; to "make all necessary repairs," *Myers v. Burns*, 38 Barb. 401; *Beach v. Crain*, *supra*; *Leavitt v. Fletcher*, 10 Allen, 119; to "repair and keep in repair," *Green v. Eales*, 2 Q. B. 225; to "keep in good repair," *Tilden v. Tilden*, 18 Gray, 108, 109; *Cline v. Black*, 4 Mc-

Cord, 481; "except wear and tear," *McIntosh v. Lown*, 49 Barb. 550; or "well and sufficiently to repair, support, uphold, &c., &c.," *Digby v. Atkinson*, 4 Camp. 276; *Walton v. Waterhouse*, 2 Saund. 420.

In *Hitchins v. Warner*, 5 Barb. 668, it was held that a covenant to "surrender up in same condition as at date of the lease," did not bind the lessee to rebuild, as the covenant looked not to repair, but redelivery; and in *McIntosh v. Lown*, 49 Barb. 550, 555, it was stated as settled law that a covenant to "repair and leave in same repair as at date of lease," did not bind lessee to rebuild. But this goes beyond the preceding case, where such words, it was admitted, would so bind the lessee. And there can be no doubt that they make a covenant to repair. *Ross v. Overton*, *supra*; *Kramer v. Cook*, 7 Gray, 550, 558; *Jaques v. Gould*, 4 Cush. 384, 388.

⁴ *Badeley v. Vigurs*, 4 Ellis & B. 71.

⁵ *Close v. Wilberforce*, 1 Beav. 112; *Willson v. Leonard*, 3 *id.* 873.

⁶ *Pilkington v. Shaller*, 2 Vern. 374.

its consequent liabilities;¹ but the important consequences of this doctrine, particularly to the mercantile community, who are in the habit of taking deposits of leases as securities for temporary loans, caused the question to be reviewed, when it was determined, that although the lessor may consider the depositary of the lease its equitable assignee, yet that he has no equity to compel him to take an assignment of the lease, or the depositor to assign it.² Nor will the court compel an equitable assignee, at the suit of the lessor, to discover whether the lease has been assigned to him for the purpose of forcing him to perform the covenants embraced therein.³

§ 366. Where there is, besides a covenant to repair, a *covenant to insure* for a certain sum, and the premises are burned, the lessee's liability to rebuild is not limited to the amount for which he agreed to insure.⁴ Nor has the tenant any equity to compel his landlord to expend money received from an insurance company in rebuilding the demised premises, on their being burnt down, or to restrain the landlord from suing for the rent, until after the premises shall have been rebuilt.⁵ An eviction by elder title will absolve the lessee from a covenant to repair, for the land being gone, the covenant is annulled.⁶ But an eviction out of part of the thing demised is no defence to an action for a breach of this covenant, unless it be shown, that the lessee has been evicted from that part of the land where the repairs were to be done, and so prevented from fulfilling his covenant.⁷ The general covenant of the lessee to repair, extends to all buildings erected during the term, as well as to the buildings demised; if, therefore, upon a demise of three houses with such a covenant, the lessee builds a fourth, he will be bound to repair this also.⁸

§ 367. *As between co-tenants*, both equally bound to repair, or to *support a partition wall*, or fence, the rule is that either party, if the other refuses to join him in making a necessary repair, may, after giving reasonable notice (in New York it is a month's notice), proceed to do what is necessary to be done, and charge his co-ten-

¹ *Lucas v. Commerford*, 1 Ves. 235; s. c. 3 Bro. Ch. 166, cited *Flight v. Bentley*, 7 Sim. 158.

² *Moore v. Choat*, 8 Sim. 508; *Jenkins v. Portman*, 1 Keen, 485.

³ *Sparkes v. Smith*, 2 Vern. 275.

⁴ *Digby v. Atkinson*, 4 Camp. 275.

⁵ *Leeds v. Cheetham*, 1 Sim. 146.

⁶ *Andrews v. Needham*, Noy. 75; s. c. Cro. El. 656.

⁷ *Carrel v. Reed*, Cro. El. 874; *Sneling v. Stagg*, Bull. N. P. 165; *Morrison v. Chadwick*, 7 C. B. 266; *Newton v. Allin*, 1 Q. B. 518.

⁸ *Douse v. Earle*, 3 Lev. 264.

ant with his proportion of the expense. And, if there had once been a division-fence between them, which one party has improperly removed, without giving three months' notice to the other, of his intention to let the land lie open, as required by the statute, he is liable not only for his proportion of the expense of making a new fence, but also to all damages sustained by the other party, in consequence of such removal.¹ But as between a tenant and his landlord, it has been decided, that if a tenant under a covenant to repair pulls down a party wall (being in a ruinous condition), and rebuilds it, intending to do so at the joint expense of himself and the occupant of the adjoining house, to whom he gave the notice required by statute, but without the landlord's authority, he cannot maintain an action against his landlord for a moiety of the expense of rebuilding such wall.² The estate of a tenant at will being so uncertain, the law imposes no obligation upon him for dilapidations; the landlord has, therefore, no remedy against him except for wilful waste, in which case, as we have seen, he forfeits his interest in the estate. He is not bound to repair, and takes no charge upon himself, but to occupy and pay rent.³

§ 368. The usual mode of *showing the damages* sustained by a breach of the covenant to repair, where the term is at end, is to prove, by surveyors or builders, the sum it would take to put the premises into that state of repair in which the defendant ought to have kept them, according to the terms of his covenant.⁴ And the jury, in such a case, may allow the landlord not only the actual expense of the repairs, but also some compensation for the loss of the use of the premises, whilst they were undergoing repair.⁵ But where the tenancy is still subsisting, and there is yet a considerable portion of the term remaining, the damages must be estimated, not by considering what it would cost to put the premises into proper repair, but what damage the present state of want of repair is to the reversion; the former could not be a correct criterion, because the landlord, if he recovered as damages the sum necessary to put the premises in repair, is not bound to lay out any portion of it in repairing them.⁶ And where the les-

¹ 8 Kent, Com. 352; *Richardson v. McDougall*, 11 Wend. 46. Money expended by a lessee in repairs may be recovered against a sub-lessee, who is bound to repair. *Colley v. Streeton*,

² *Pizey v. Rogers*, Ry. & M. 357.

³ *Countess of Salop v. Crompton*, Cro. El. 777; Co. Lit. 71.

⁴ *Penley v. Watts*, 7 M. & W. 601.

⁵ *Woods v. Pope*, 1 Bing. N. C. 467.

2 B. & C. 278.

⁶ *Doe v. Rowlands*, 9 C. & P. 784; *Smith v. Peat*, 9 Exch. 161; *Turner v. Lamb*, 14 M. & W. 412. From the last

sor was bound by covenant to repair "the external parts of a demised house," which was damaged in consequence of the house adjoining to it being pulled down and the party-wall giving way, the jury gave the plaintiff, as damages, not only the sum he laid out in building the party wall, the value of certain damage done by the wall giving way, the cost of painting and papering, rendered necessary by the rebuilding of the wall, cost of replacing fixtures, and the architect's charges, but also the rent he paid for other premises whilst the wall was rebuilding, the costs of alterations, necessary to enable him to carry on his business in these latter premises, and the cost of restoring those premises to their original state after the wall was rebuilt. The court, however, held that the plaintiff was not entitled to these three latter items of damage; because, if the defendant had rebuilt the wall, he would not have been bound to find other premises for the plaintiff during the time the wall was rebuilding.¹

SECTION II.

OF THE COVENANT TO PAY RENT.

§ 369. *Rent* is a certain profit, either in money, provisions, chattels, or labor, issuing yearly out of lands and tenements, in return for their use. Some of its properties, at common law, are certainty, or the power of being reduced to a certainty, by either party; and that it issue yearly, for although it need not issue out of each successive year, yet, as it is to be produced out of the profits of lands and tenements, as a compensation for their enjoyment, it must be renewed yearly, because such profits arise and are renewed

of these cases it would seem, the amount of damages depends on the length of the term, which is still unexpired.

¹ *Green v. Eales*, 2 Q. B. 225. Another question which relates to the damages recoverable under a covenant to repair, arises where there is a lease and an under-lease, both of which contain a covenant to repair, and the superior landlord has sued the lessee on his covenant. In *Neale v. Wyllie*, 8 B. & C. 588, it was held that in such case the damages and costs recovered in that action and also the costs of defending it, might be claimed as special damage in an action by the lessee, against

the under-lessee, for the breach of his covenant to repair. The correctness of this decision, however, was doubted in *Penley v. Watts*, 7 M. & W. 601, so far as relates to the costs of the first action, and was overruled by the case of *Walker v. Hatton*, 10 M. & W. 249, where it was held that the costs occasioned by the defence of the first action were not recoverable against the under-lessee, as they were not necessarily caused by the breach of covenant on his part. And see *Smith v. Howell*, 6 Exch. 780; *Pennell v. Woodburn*, 7 C. & P. 117; *Short v. Kalloway*, 11 A. & E. 28; *Blyth v. Smith*, 5 M. & G. 405.

annually. It must, also, issue out of the thing demised, and not be part of the thing itself; and must, necessarily, issue out of lands and tenements corporeal merely, for out of such only can the lessor distrain.¹

§ 370. There are, at common-law, three kinds of rent: *rent-service*, *rent-charge*, and *rent-seek*. Rent-service was so called, because it had some corporeal service incident to it; as if a tenant held his lands by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent; these pecuniary rents being connected with personal services were, therefore, called rent-service and were always annexed to and connected with a reversionary estate remaining in the grantor. To this species of rent the right of distress was incident, so long as the reversion remained in the landlord.² A rent-charge was where the proprietor parted with his land, but, by the grant, reserved to himself a certain rent, with a clause authorizing its collection by distress, and it was called a rent-charge because the lands were charged with such distress, only by force of the deed, and not of common right. While a rent-seek, or barren rent was nothing more than a rent reserved by deed, without any right of distress, and which could only be collected by an ordinary action of debt.³ The difference between these various species of rent, so far, at least, as regards the remedy for their recovery, is now virtually abolished in England, as it was in New York, even previous to the abolition of distress for rent; since the statutes of both countries authorized all persons to distrain for any certain services, or certain rent, reserved out of any lands or tenements, which shall not be paid or rendered when due.⁴

§ 371. Besides the reservation of rent in the demise, a special

¹ Co. Lit. 47, a; 142, a; *Merrit v. Fisher*, 19 Iowa, 854. But the courts of Pennsylvania have departed from this doctrine, and hold that rent as such flows from chattels parcel of the demise. See *ante*, § 17, note 3.

² Of this kind are the so called manor leases in New York; because by the statutes 1787, re-enacting the statute *quia emptores*, the rent reserved therein,—the demise being in fee—is no longer considered a rent-service. See *Van Rensselaer v. Hay*, 19 N. Y. 68; *Same v. Read*, 26 *id.* 558; while on similar demises in fee in Pennsylvania, the rent is a rent-service, as the statute of *quia emptores*

never was in force there. The popular objections to many of these leases have been fully examined, and the anti-rent movement in New York freely discussed, by the Hon. D. D. Barnard, in the December number of the *American Review* for 1846. It is a calm, earnest, and able review of the whole subject, and had an extensive influence in quieting the public agitation which then pervaded the State of New York.

³ *People v. Haskins*, 7 Wend. 463; *Cuthbert v. Kuhn*, 8 Whart. 357; *Cornell v. Lamb*, 2 Cow. 652; Litt. § 217.

⁴ 4 Geo. II. c. 28; 1 R. S. 747, § 18; 8 Kent, Com. 461, n. b.

covenant for its payment is usually inserted:¹ but if there is no agreement between the parties, the law will imply a promise on the part of a tenant, to pay the landlord, for his permission to occupy the premises, as much as they are reasonably worth; an obligation which is incumbent upon an occupant so long as he continues to hold, without obstruction on the part of the landlord. But although a lessee, during his occupation, or an assignee, while his enjoyment lasts, may, without any covenant, be compelled to pay rent;² yet, in the absence of this covenant, he may, by assigning over, discharge himself of all future responsibility.³ And, as the premises might be transferred to a beggar,⁴ an insolvent,⁵ or person leaving the country (provided the assignment be executed before his departure), the lessor would, to a certain extent, lose his security for rent,⁶ and the express covenant, therefore, possesses an obvious advantage over the implied one. For these reasons, a covenant to pay rent is generally contained in every indenture of lease. And as the liability of a lessee on this covenant, will not be in any manner impaired or affected, by his act of assigning over the lease, but remains valid against him and his executors (having assets), until the end of the lease;⁷ this covenant, in the event of a tenant's alienation, affords the landlord a double claim for the payment of his rent; the assignee being chargeable in consequence of his privity of estate, and the original lessee still continuing bound in respect to his contract. This is a covenant running with the land, binding on an assignee of the lease, without his being specially named,⁸ and, in the case of an *indenture* executed by the lessee, will arise upon the ordinary words of reservation, *yielding*

¹ Sometimes a provision is inserted in a lease, whereby the lessee mortgages all his chattels upon the demised premises, as security for the rent. This is held good as a mortgage of the property on the premises at the time of making the lease; but such a provision in respect to property which might thereafter be brought upon the premises is void in New York, as against the policy of the act to abolish distress for rent. Per Denio, J., in *Van Heusen v. Radcliff*, 17 N. Y. 580.

² *Ante*, § 154; *post*, §§ 442-447.

³ *Pitcher v. Tovey*, 4 Mod. 71; s. c. 12 Mod. 23; *Treackle v. Coke*, 1 Vern. 165; *Staines v. Morris*, 1 V. & B. 11.

⁴ *Taylor v. Shum*, 1 B. & P. 21.

⁵ *Onslow v. Corrie*, 2 Madd. 330.

⁶ *Dalston v. Reeve*, 1 Ld. Ray. 77; *Webb v. Russell*, 3 T. R. 402; *Iggulden v. May*, 9 Ves. 330.

⁷ *Pitcher v. Tovey*, 1 Salk. 81; *Buckland v. Hall*, 8 Ves. 95. The obligation of a lessee is primary and absolute, and that of a guarantor secondary and conditional; and these obligations are separate and not joint, and will not support a joint action by the lessor against the lessee and the guarantor, when in separate instruments. *Tibbits v. Percy*, 24 Barb. 39.

⁸ *Main v. Feathers*, 21 Barb. 646; *Dolph v. White*, 12 N. Y. 296. An assignment by the lessor of the rent of leasehold premises, creates such a privity of estate between the assignee and the lessee, that the former may maintain a suit in his own name for the rent, which accrues and becomes payable, while such privity of estate exists. *Childs v. Clark*, 8 Barb. Ch. 52.

and *paying*.¹ It is held, however, that the words, "subject to payment of the rent reserved," &c., in an assignment of a lease, do not amount to a covenant, and give no right of action against the assignee, for they are words of qualification and not of contract.²

§ 372. When the relation of landlord and tenant has been once established, the tenant cannot resist a demand of rent, unless he shows that he was evicted, or otherwise legally entitled to quit the possession, and has done so in an unqualified manner; or that the landlord has accepted another person as tenant in his stead.³ And no accident to the demised property, or misfortune to the lessee, will relieve him from his express covenant, so long as this relation continues. In an ancient case, which occurred during the civil wars of England, the tenant objected, as a reason why he should not pay rent, that Prince Rupert, an alien born, with a hostile army, had driven him out of possession of the premises; but the court determined, that, though the whole army had been alien enemies, he was still bound to pay his rent, because he had expressly covenanted.⁴ So if the land be surrounded or gained upon by the sea, or in any other way rendered useless, still as the lessee is to have the advantage of all profits, he must run the hazard of casual losses, and will be liable for the whole rent.⁵ And though the premises are entirely destroyed by unavoidable accidents of fire, flood, or tempest,⁶ the tenant is still liable to pay rent under his express covenant, notwithstanding their ruinous condition.⁷

¹ *Holford v. Hatch*, 1 Doug. 188; *Vyvyan v. Arthur*, 1 B. & C. 416. An annual rent reserved by deed, upon a grant in fee, is held, in New York, to be valid as a rent-charge; and is a covenant running with the land, binding upon the heir or assignee, independent of any tenure or reversion. *Van Rensselaer v. Hays*, 19 N. Y. 68.

² *Wolveridge v. Steward*, 8 Tyrw. 687; s. c. 1 Cr. & M. 644.

³ *Ward v. Mason*, 9 Price, 294; *Cleves v. Willoughby*, 7 Hill, 83.

⁴ *Paradine v. Jane*, Aleyn, 26; *Wagner v. White*, 4 Har. & J. 664. It has been held, however, in South Carolina, that where a tenant has been dispossessed by an enemy, he ought to pay rent only for the time he peaceably enjoyed, and not for the time he was prevented by the casualties of war. *Bayley v. Lawrence*, 1 Bay, 499.

⁵ *Richard le Taverner's case*, Dyer, 56, a; *Paradine v. Jane*, Aleyn, 27; 1 Rol. Abr. 286, l. 5.

⁶ *Hallett v. Wylie*, 3 Johns. 44; *Fowler v. Bott*, 6 Mass. 68; *Monk v. Cooper*, 2 Ld. Ray. 1477; *Belfour v. Weston*, 1 T. R. 810; *Medwin v. Sandham*, 8 Swanst. 686. In *Ripley v. Wightman*, 4 McCord, 447, it was held, that, where a hurricane rendered a house untenable, this was a good defence to an action for rent. But this, as well as the other South Carolina case, are evidently exceptions to the general rule of law, that when a man takes a charge upon himself, by his own special agreement, he is still liable in damages resulting from a non-performance, although its performance should become impossible, it is of course otherwise, where the law creates a duty or implies a liability, for there the party is discharged from the obligation, if performance becomes impossible; nor would he, in such case, be bound to pay rent, if he had no beneficial enjoyment of the premises.

⁷ *Monk v. Cooper*, 2 Stra. 763; *Holtzapffel v. Baker*, 18 Ves. 116; *Hare v. Groves*, 3 Anstr. 687; *Izon v. Gorton*, 5

§ 373. Contracts implied by operation of law admit of a more liberal construction, and may be moulded according to the dictates of reason and justice; but express covenants are to be construed strictly, and the person contracting not only assumes to do the thing stipulated, but takes on himself all risk of performance.¹ An exception of casualties by fire, introduced into the covenant to repair, will not change the case, since the exception has no relation to the covenant to pay rent.² According to the strictness of the ancient law, a tenant could not, in a suit for rent, set up in defence that the premises had become uninhabitable, or that the landlord had broken his covenant to repair; because the amount of damages sustained by the tenant being uncertain, could only be made the subject of a cross-action, and was, therefore, incapable of being set off against the demand for rent, which is a certain fixed amount.³

§ 374. But it may now be considered a well-settled principle, that a defendant need not resort to a cross-action on the plaintiff's contract of indemnity in any case, but may set up his damages, by way of extinguishing or reducing the plaintiff's demand. When the demands of both parties issue out of the same contract or transaction, the defendant is allowed to *recoupe*,⁴ although the damages on both sides are unliquidated; but he can *set off* only where the demands of both parties are liquidated, or capable of being ascertained by calculation. It was formerly supposed that there could only be a recoupment where some fraud was imputable to the plaintiff, in relation to the contract on which the action was founded; but the doctrine is now applied to cases where the defendant imputes no fraud, and only complains that there has been a breach of contract on the part of the plaintiff. And, for the purpose of avoiding circuitry, or multiplicity of action, and

Bing. N. C. 501; *Arden v. Pullen*, 10 M. & W. 321; *Harrison v. Lord North*, 1 Ca. in Ch. 88; *Richard le Taverner's case*, *supra*.

¹ *Warren v. Powers*, 5 Conn. 381; *Bohannon v. Lewis*, 3 T. B. Monr. 376.

² *Belfour v. Weston*, 1 T. R. 310; *Pindar v. Ainsley*, *ib.* 312; *Doe v. Sandham*, *ib.* 710. So *Leavitt v. Fletcher*, 10 Allen, 119. In *Scott v. Fritz*, 51 Pa. St. 418, where the lessee was also mortgagee, in a suit for rent, it was held he could not set off the mortgage interest.

³ *Watts v. Coffin*, 11 Johns. 495; *Weigall v. Waters*, 6 T. R. 488. In an action on the lessee's covenant to pay rent, the lessee cannot *set off* his claim on the lessor's

covenant to pay him for improvements at the end of the term. *Tuttle v. Tompkins*, 2 Wend. 407. The subject of a set-off to demands for rent will be found discussed in those subsequent parts of the work which treat of actions for rent. § 680, &c. And see *ante*, § 329, note 1. In Pennsylvania, however, in one case non-repair was treated as a failure of the consideration of tenant's covenant to pay rent. *Fairman v. Fluck*, 5 Watts, 516.

⁴ *Recoupe*, to keep back something that is due, but which there is an equitable reason to withhold. *Ives v. Van Epps*, 22 Wend. 155; *Westlake v. Degraw*, 25 Wend. 669; *Reab v. McAlister*, 8 *id.* 109.

doing complete justice to both parties, they are allowed — and compelled if the defendant so elect — to adjust all their claims growing out of the same contract in one action. The defendant, however, has his election, whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action. But whatever may be the amount of his damages, he can only set them up, if uncertain, by way of abatement, either in whole or in part, of the plaintiff's demand; he cannot, as in case of a set-off, go beyond that, and have a balance certified in his favor. And if a plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time, and relating to the same subject-matter, the defendant may recoup his damages arising from the breach of another part; and this, whether the different parts be contained in one instrument or in several, or where one part is in writing and the other verbal, or whether the damages are liquidated or not.¹

§ 375. That a tenant is bound to continue the payment of rent after the destruction of the tenement by fire or other external violence, and has no relief against an express covenant to pay rent, is a proposition generally true, in every case where he has not protected himself by a saving clause in the lease; or the lessor has covenanted to rebuild, and failed to perform his covenant.² Mr. Chancellor Walworth concludes an elegant and learned opinion, in a case which arose in New York, by stating it to be well settled in that State, that a lessee has no relief under those circumstances, either at law or in equity. In this case, indeed, there was an agreement between the lessee and the agent of the lessor, that the rent should cease if the building should be casually destroyed, and that a stipulation to that effect should be inserted in the lease; but

¹ *Batterman v. Pierce*, 3 Hill, 171; *Ives v. Van Epps*, *supra*; *Van Epps v. Harrison*, 5 Hill, 68; *Barber v. Rose*, *ib.* 76; *Whitbeck v. Skinner*, 7 *ib.* 68; *Nichols v. Dusenbury*, 2 N. Y. 283; *Mayor v. Mabie*, 13 N. Y. 151; *Wright v. Lattin*, 38 Ill. 298; *Myers v. Burns*, 35 N. Y. 269. But where the acts pleaded amount to an eviction, although damages are alleged flowing therefrom, these are not allowed either as set-off or recoupment. *Dunwoody v. Raynor*, 52 Pa. St. 292.

² *Gates v. Green*, 4 Paige, 355; *Welles v. Castles*, 3 Gray, 323; *Gibson v. Perry*, 29 Mo. 245; *Procter v. Keith*, 12 Ky. 252; *Holtzapfel v. Baker*, 18 Ves. 116; s. c. 4 Taunt. 45; *Leeds v. Cheetham*, 1 Sim.

146; *Lamott v. Sterett*, 1 Har. & J. 42; *Philips v. Stevens*, 16 Mass. 240; *Howard v. Doolittle*, 3 Duer, 464. *Cross v. Button*, 4 Wisc. 468; and on principle the lessor's covenant to repair is a condition precedent to rent, for it binds him to rebuild; and see *Myers v. Burns*, 33 Barb. 401; but *Leavitt v. Fletcher*, 10 Allen, 119, is *contra*. A lessee, however, is not liable for rent, where the premises have been destroyed, after the execution of the lease, but before the commencement of the term, and before he has taken possession; for the delivery of possession is necessary to establish the landlord's right to collect rent. *Wood v. Hubbell*, 5 Barb. 601; s. c. 10 N. Y. 479.

this stipulation was inadvertently omitted by the negligence of the person employed to prepare the lease, and the premises were afterwards accidentally burned; the lessor was perpetually enjoined from prosecuting any suit, or proceeding for the recovery of rent which accrued subsequent to the destruction of the premises; and the lease itself was ordered to be given up and cancelled.¹ But subsequent legislation in New York, has, as before intimated, modified this rule of law by providing that a tenant may quit and surrender any building in his occupation, which, without his fault or neglect, shall be destroyed, or so much injured by the elements, or any other cause, as to become untenable and unfit for occupation; and that he shall not be liable to pay rent, after such destruction or injury.²

§ 376. Every tenant, therefore, should provide in his lease for a

¹ *Gates v. Green, supra*. In this case, the learned Chancellor considers it to be a principle of natural law, that a tenant who rents a house, or other tenement, for a short period, and with a view to no other benefit except that which may be derived from its actual use, should not be compelled to pay rent any longer than the tenement is capable of being used. By the law of Scotland, upon the hire of property, a loss or injury to such property which is not caused by the fault or negligence of the hirer, falls on the owner; and the lessee is entitled to an abatement of the rent, proportioned to any partial destruction of the subject. The Napoleon Code, art. 1722, also declares, that if the thing hired is destroyed by fortuitous events, during the continuance of the lease, the contract of hiring is rescinded; but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the price, or the rescinding of the lease itself. The same provision, substantially, is found in the Code of Louisiana, art. 2867. The learned commentator on the law of nature and of nations (*Puffendorf*) also considers this a plain principle of natural law; and he refers to a law of Sesostrius, an Egyptian king, that if the violence of the river should wash away a part of the land, the tenant should be proportionably abated in his rent. The same principle has found its way as far north as Newfoundland; where, by the custom of that country, the tenant of a building may surrender his lease, and be excused from the further payment of rent, in case of a casual destruction of the building by fire. And *Rutherford*, in his lectures on natural law, makes a very sensible

distinction between a casualty which destroys the value of the use of the property, which loss naturally falls on the lessee, and one which destroys the property itself, of which the lessee has hired the use; in which latter case he holds, that the lessee is excused from the payment of further rent. Many cases in the reports show that some of the English Chancellors struggled hard to introduce this principle of natural law into the administration of justice in their courts. *Brown v. Quilter*, Amb. 619; *Steel v. Wright*, 1 T. R. 708. A contrary principle, however, finally prevailed in the Equity Courts of England, as well as in the courts of law; and it must now be considered as settled law, in this State, that a lessee of premises which are burned, has no relief against an express covenant to pay the rent, either at law or in equity; unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild.

² *Laws of New York, 1860, p. 592*. What is such an injury to the premises as will authorize a surrender of possession under the act. See *Fash v. Kavanagh*, 24 How. Pr. R. 347. This statute applies only where the injury or destruction occurs after the lessee's entry, and not where it existed at or before that time. *Bloomer v. Merrill*, 1 Daly, 485. And see *Wall v. Hinds*, 4 Gray, 256. In Louisiana, where a lessor is bound to repair, his omission to do so will not, where the rent is sufficient to enable the tenant to make them, and deduct his expenditure from the rent, authorize a rescission of the lease, or an action for damages. *Scudder v. Paulding*, 4 Rob. La. 428.

suspension of the rent, during such time as the premises remain uninhabitable by reason of accidental fire, or other casualty. But a provision in a lease, that the rent shall cease if the premises become uninhabitable by *fire or other casualty*, does not extend to the case of a building which becomes untenable in consequence of the greater portion of it being taken down, to conform to an order of the corporation for the widening of the street on which it is situated.¹ At common law, however, a lessee, who is under a covenant to pay rent and repair, without an express exception on his part of all casualties by fire or tempest, is liable to pay rent upon his covenant, although the premises are burnt down and not rebuilt by the lessor, after he is notified of the accident and required to rebuild; for, whatever was the default of the lessor in not rebuilding, he is liable for damages to the lessee; and, although it may be a hard case, yet the lessee must, at all events, perform his covenant, by which he was expressly bound to pay rent during the term.²

§ 377. But it is to be observed, that all such cases depend upon the express agreement of the parties; the general rule of law being, that, when the law creates a duty or charge, and the party is disabled from performing it, without his fault, and he has no remedy over against some other person, the law will excuse him; but when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or inevitable necessity; because he might have provided against it by his own contract, but did not think proper to do so.³ And, perhaps, there is as much equity, that the loss of rent should, in such case fall upon the lessee, as upon the lessor, since the tenant has expressly agreed to pay it without reserve, and the landlord must bear the loss of the property destroyed. Besides, fires often occur by the carelessness of the tenant, and the obligation to pay rent after the destruction of the premises, tends to increase a reasonable and necessary vigilance on his part.

§ 378. The quiet enjoyment of the premises without any molestation on the part of the landlord, is an implied condition on which the tenant is bound to pay rent.⁴ Rent is something given by way

¹ *Mills v. Baehr's Executors*, 24 Wend. 254.

² *Paradine v. Jane*, Aleyn, 26; *Ches-terfield v. Bolton*, Com. 627; *Bullock v. Dommitt*, 6 T. R. 650.

³ *Beale v. Thompson*, 3 B. & P. 420; *ante*, § 372.

⁴ Rent is due when it depends alone on the will of the hirer or lessee to enjoy the thing hired, or when he has not been pre-

of retribution to the lessor for the use of the land; and, consequently the landlord's claim for rent depends upon this, that, so far as he is concerned, the land is possessed and enjoyed by the tenant during the term specified in his contract; for the tenant ought not to make a return for a thing which he has not. If, therefore, the tenant be at any time deprived of the premises by the landlord's agency, the obligation to pay rent ceases, because his obligation has force only from the consideration, which is the enjoyment of the premises.¹ From this principle, it also follows that if the land be recovered by a third person by a title superior to that of the lessor, the tenant is discharged from the payment of rent, after eviction by such recovery. If part only of the land is recovered, such an eviction is a discharge of so much of the rent as is in proportion to the value of the land evicted.² But if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until the possession is restored.³ And the reason why there should be no apportionment of the rent in the latter case is, that it is done by the wrongful act of the landlord himself, and no man should be encouraged to disturb a tenant in the possession of that, which, by the policy of the feudal law, he ought to protect and defend.⁴ While the reason for the exception to the rule, where

vented from enjoying it by the lessor. *Tio v. Vance*, 11 La. 200.

¹ *Pendleton v. Dyett*, 4 Cow. 581; Same case in Error, 8 *id.* 727; *Poston v. Jones*, 2 Ired. Eq. 360. An eviction in fact or in effect, which renders the premises useless, will prevent a recovery of rent. *Halligan v. Wade*, 21 Ill. 470. But it does not amount to an eviction that the landlord altered the rooms of the house, so as to make them somewhat narrower, the tenant remaining in possession. *Campbell v. Shields*, 11 How. Pr. R. 565. But in *Upton v. Townsend & Greenlees*, 17 C. B. 30; where the lessor under his covenant to restore rebuilt two houses destroyed by fire, altering both by diminishing one and enlarging the other, it was held an eviction of both tenants, though both houses were much improved. There was no subsequent occupation by the tenants; but as there was a physical ouster, this does not seem material. The question what is an eviction, was elaborately discussed, and it was defined as "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of de-

priving the tenant of the enjoyment of the premises as demised." And, again, "an act of permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised or a part of it." And see *ante*, §§ 305-315, and § 829, for other instances.

² *Lansing v. Van Alstyne*, 2 Wend. 561; *Stevenson v. Lamhard*, 2 East, 575; *Hunt v. Cope*, Cowp. 242; *Moffat v. Strong*, 9 Bosw. 57; *Carter v. Burr*, 89 Barb. 59. An eviction by title paramount from an undivided portion of the premises, is no bar to an action for rent, for it may be apportioned. *Lansing v. Van Alstyne*, *supra*.

³ *Graham v. Anderson*, 3 Harringt. 364; *Bennet v. Bittle*, 4 Rawle, 389; *Dalston v. Reeve*, 1 Ld. Ray. 77; *Jordan v. Twells*, Ca. Temp. Hardw. 171; *Walker's case*, 8 Co. 22; *Lloyd v. Tomkies*, 1 T. R. 671; *Salmon v. Smith*, 1 Saund. 202-204, n. 2. *Lewis v. Payn*, 4 Wend. 428; *Chatterton v. Fox*, 5 Duer, 64; *Fitchburg Co. v. Melven*, 15 Mass. 238; *Day v. Watson*, 8 Mich. 535.

⁴ *Lewis v. Payn*, *supra*; *Etheridge v. Osborn*, 12 Wend. 529; Co. Lit. 148, b. An eviction by a paramount title has no

part is recovered by a title paramount to that of the lessor, seems to be that in this case the landlord is not so far in fault as that he should be deprived of some return for that part of the premises which remains in the tenant's possession.¹

§ 379. Upon the principle that a tenant shall not be required to pay rent, even for the part of the premises which he retains, *if he has been evicted* from the other part by the landlord, it has been held, that, if a landlord, without the consent of his tenant, uses privileges appurtenant to the premises, and which are not expressly reserved in the lease, he is not entitled to collect rent.² But where a landlord does acts merely tending to diminish the beneficial enjoyment of the premises, and the tenant continues to occupy them, the obligation to pay rent continues.³ Nor will an eviction from either the whole or part of the demised premises, have any effect upon rent due, at the time of the eviction, for the landlord is still entitled to collect whatever rent has accrued before the tenant actually quit the possession.⁴ So, if the rent is payable quarterly in advance, an eviction during the quarter, but after the rent becomes due, does not bar an action for the rent; the most an evicted tenant can equitably claim under these circumstances, is a deduction for so much of the quarter as elapses after his eviction.⁵

§ 380. In order to *produce an eviction*, it is not necessary there should be an actual physical expulsion, for the landlord may do

effect upon the recovery of rent already accrued. *Selby v. Browne*, 7 Q. B. 620.

¹ *Lawrence v. French*, 25 Wend. 448; *Ludwell v. Newman*, 6 T. R. 458; *Tomlinson v. Day*, 2 Brod. & B. 680.

² *Briggs v. Hale*, 4 Leigh, 484; *Christopher v. Austin*, 11 N. Y. 216; *Shumway v. Collins*, 6 Gray, 227; *Neale v. Mackenzie*, 1 Mees. & W. 747; *Blair v. Claxton*, 18 N. Y. 529; *Vaughan v. Blanchard*, 1 Yeates, 175; *Griffith v. Hodges*, 1 C. & P. 419. So *Leishman v. White*, 1 Allen, 489, where it was held that no recovery could be had on the lease because of the eviction, nor in use and occupation for the part retained, as the contract was entire.

³ *Edgerton v. Page*, 20 N. Y. 281; *Academy of Music v. Hackett*, 2 Hilt. 217; *Mortimer v. Brunner*, 6 Bosw. 653. A mere trespass by the landlord—as where he piled firewood on part of the leased land—and which did not interfere with the substantial enjoyment of the premises, does not amount to an eviction, nor release the tenant from the payment of rent. The

lessee's remedy is, by an action against the lessor for the injury, if any, which he has sustained. *Lounsbury v. Snyder*, 31 N. Y. 514.

⁴ *Kesler v. McConachy*, 1 Rawle, 435; *Baynton v. Bobbet*, 2 Vent. 68; *Stokes v. Cooper*, 8 Camp. 514, n.; *Neale v. Mackenzie*, *supra*; *Fitchburg Man. Co. v. Melven*, 15 Mass. 268; *Edgerton v. Page*, *supra*; and see *Salmon v. Smith*, 1 Saund. 204, n. 2; *McKeon v. Whitney*, 8 Den. 452. Where a landlord is made a party to the foreclosure of a mortgage upon premises which the decree directs him to surrender to the purchaser, he being entitled to possession until the surrender is to be made, is entitled to the rents which accrued to that time; even though such rents be payable in advance, so that a part of the term for which it is due comes after the surrender by him, and the consequent eviction of his tenant. *Giles v. Comstock*, 4 N. Y. 270.

⁵ *Whitney v. Meyers*, 1 Duer, 266; and see *Cram v. Dresser*, 2 Sandf. 120; *Carter v. Burr*, 39 Barb. 59.

many acts tending to diminish the enjoyment of the premises, besides an actual expulsion, which will amount to an eviction in law, and exonerate the tenant, if he quits possession, from the payment of rent. For, as we have said, a tenant is required to pay rent only for the beneficial enjoyment of the premises, unmolested in any way by the landlord; if, therefore, he should erect a nuisance so near the premises as to deprive the tenant of the use of them, by driving him away from them, it amounts to a constructive eviction, and no rent can be recovered. And where the lessor was guilty of habitually bringing lewd women under the same roof with the demised premises, though in an apartment not demised, by which nocturnal noise and disturbance was made, and in consequence the lessee quitted the premises with his family, it was held to amount to an eviction, and no rent was recoverable.¹ But no wrongful act of the landlord will suspend or extinguish the rent, if the tenant continues to occupy the premises during the time such rent accrued.² And the act complained of must proceed from the landlord, for where a tenant abandons the premises, and resists the

¹ *Pendleton v. Dyett*, *supra*. The Superior Court of the city of New York, in *Cohen v. Dupont*, 1 Sandf. 260, appear to have carried out the doctrine of an eviction by the landlord's misconduct to the utmost verge of the authorities; holding, that an intentional disturbance of the tenant's beneficial use and enjoyment of the premises, injurious to his business, and destructive of the comfort of himself and family, which disturbance was produced by the landlord's family, but with his knowledge, constituted an eviction by the landlord, authorizing the tenant to quit the premises, and precluded the recovery of rent. In a subsequent case, however, *Cram v. Dresser*, 2 Sandf. 120, the same court held, that a wrongful act of the landlord, causing great inconvenience and trouble to the tenant's family, and keeping the demised premises in confusion and disorder for a long period, by an unreasonable delay in the painting and repairing he had undertaken to do, although it might have justified the tenant in considering it as an eviction, could not be set up as such, where the tenant continued in possession for a year after the injury was sustained.

² *Egerton v. Page*, *supra*. The distinction taken here and in the preceding section is, that if there is a physical ouster of however small a part of the premises demised, the tenant need pay no rent for the

part retained by him, and need not abandon it in order to complete the eviction. See cases cited *ante*, § 378, notes 1 and 2, § 379, note 4. But if there are only acts of trespass on the part of the landlord, or which merely diminish the beneficial occupation of the lessee, he must abandon the premises or be still bound for the rent. See cases cited in the preceding note, also *Elliott v. Aiken*, 45 N. H. 35; *Upton v. Greenlees*, 17 C. B. 51, 64-68, per Jervis, C. J., and Williams, J.; *Gilhooley v. Washington*, 4 N. Y. 217; *Wilson v. Smith*, 5 Yerg. 379; *Morrison v. Chadwick*, 7 C. B. 266, 284; *Rogers v. Ostrom*, 35 Barb. 523. Thus a refusal by lessor to permit sub-lessee to occupy, *Randall v. Alburts*, 1 Hill, 28; or his notice to under-tenant to quit, on which the latter acts. *Burns v. Phelps*, 1 Stark. 94; *Levitzky v. Canning*, 38 Cal. 299; or refusal to give lessee a lease, &c. *Greton v. Smith*, 33 N. Y. 245. So *Boston & W. R. R. v. Ripley*, 13 Allen, 421; *Jackson v. Eddy*, 12 Mo. 209; *Peck v. Hiler*, 24 Barb. 178; *Lawrence v. French*, 25 Wend. 443. In *Halligan v. Wade*, 21 Ill. 470; the above distinction does not seem regarded and injuries to tenant's beneficial occupation were held a defence to rent, though the lessee remained in occupation. But in *Leadbeater v. Roth*, 25 *id.* 687, this case is stated in conformity with the general rule given.

payment of rent subsequently accruing, on the ground that other apartments in the same building, adjoining or below his, are occupied as a place of prostitution, he must show that the landlord created the nuisance, by leasing such apartments for that purpose, or that it existed by his connivance and consent.¹

§ 381. There is no *implied warranty* on the letting of a house or land, that it shall be reasonably fit for habitation or cultivation, or for any other purpose for which it was let. And where a person hired a house and garden for a term of years, to be used for a dwelling-house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease; the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate, that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defence to an action for rent.² And, in all cases where a tenant has been allowed to withdraw from the tenancy, and refuse payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting; or else the premises were proved to be uninhabitable by some wrongful act, or default of the landlord himself.³ But an *exception* to the rule holds, it is said, when the

¹ Gilhooley v. Washington, 4 N. Y. 217. In this case it was held, that if a landlord lets part of a house to one tenant, and another part to another, and one of them makes his part a nuisance, so as to render the other part no longer habitable, the lease to the other is not thereby determined, nor is he excused from the payment of rent; for that the doctrine of eviction by nuisance is not applicable in any case where the landlord is not instrumental in producing the nuisance; nor is the landlord under any obligation to institute proceedings against the disorderly tenant for a misdemeanor, under 2 R. S. 702, § 29. That to constitute an eviction, without physical ouster, the tenant must have abandoned the premises in consequence of acts of his landlord so illegal and monstrous as to be equivalent to an absolute physical ouster. See Mortimer v. Brunner, 6 Bosw. 653; Ogilvie v. Hull, *supra*. Annoyance to the tenant of a house which had been used as a brothel, before he lived in it, by lewd per-

sons constantly calling for admittance, so that he was obliged to remove his family therefrom, does not constitute an eviction. Nor was the landlord bound to disclose to a lessee the purposes to which the demised premises had been previously put, nor can he be held liable for the conduct of strangers, especially when relief may be had on application to the police. Meeks v. Bowerman, 1 Daly, 99.

² Cleves v. Willoughby, 7 Hill, 83; Dutton v. Gerrish, 9 Cush. 89; Foster v. Peyser, *ib.* 242; Westlake v. Degraw, 25 Wend. 669; Welles v. Castles, 3 Gray, 323; Hart v. Windsor, 12 M. & W. 68; Sutton v. Temple, *ib.* 52. These cases directly overrule the cases of Edwards v. Etherington, Ry. & M. 268; Collins v. Barrow, 1 Mood. & R. 112; and Salisbury v. Marshal, 4 C. & P. 65. The doctrine of implied warranties relates to the title, and not to the quality of the premises. Cleves v. Willoughby, *supra*.

³ Per Tindal, J., in Izon v. Gorton, 5 Bing. N. C. 501. A tenant who was induced to accept a lease by false represen-

contract is of a mixed nature, as for lodging, or of a house with furniture; where it was said the landlord does impliedly contract that it shall be reasonably fit for habitation, and that the tenant may quit without notice if it be not so. Thus, where a man took a ready-furnished house, but upon entering found it so infested with vermin as to be unfit for the occupation of a respectable family, Lord Abinger, C. B., held, that the house being let with the furniture, for occupation, for a limited period, there was an implied condition that it should be habitable when the defendant entered upon the possession; and he, therefore, left it for the jury to say, whether, under all the circumstances of the case, the alleged grievance amounted to a nuisance, or was merely made a pretext by the tenant for leaving the house.¹ And when, from the terms of the lease, it appears that the property rented is to be fitted up as a store, it will be understood that the store shall be fit for such use, at the time of the commencement of the term.²

tations continued to occupy the premises, and paid rent for nine months; and it was held by the N. Y. Com. Pleas, that both he and his surety were thereby precluded from raising the objection of fraud. *Rosenbaum v. Gunter*, 8 E. D. Smith, 208. Although no covenant of fitness is implied in the relation of landlord and tenant, for the reason that the tenant can examine the premises, and the landlord may know no more respecting it than it is in the power of the tenant to discover for himself, yet where the landlord knows that a cause exists which renders the house unfit for occupation, it is a wrongful act on his part to rent it without giving notice of its condition. And if, after discovering and experiencing its injurious effects, the tenant is compelled to quit the house, the landlord cannot enforce the contract for the payment of rent. *Wallace v. Lent*, 1 Daly, 481.

¹ *Smith v. Marrable*, 11 M. & W. 5; s. c. 1 Car. & M. 479. See also *Cowie v. Goodwin*, 9 C. & P. 378; *Potter v. Truitt*, 3 Harringt. 381. In the case of *Howard v. Doolittle*, 8 Duer, 464, the court refused to follow the case of *Smith v. Marrable*; as being not only inconsistent with other decisions of the Exchequer itself, but in direct opposition to the general rule of law, stated in the text. The Supreme Court of New York also held in *Westlake v. Degraw*, 25 Wend. 669, that a nuisance incidental to a building, and which the tenant might discover and remove, for example, a noxious smell produced by dead rats, does not

entitle him to abandon the premises; and see *Christopher v. Austin*, 11 N. Y. 216, and *post*, § 646.

² *La Farge v. Mansfield*, 81 Barb. 845. A lease of a coal-mine is no warranty that the land contains coal. *Harlan v. Lehigh Co.*, 85 Pa. St. 287. So where the lease was of surplus water power, the lessor was not bound to keep the canal in order. *Trustees v. Brett*, 25 Ind. 409; *Morse v. Maddox*, 17 Mo. 569; *Ballard v. Butler*, 80 Me. 94; but where the lessor was to furnish steam-power here, as an overt act was contemplated on the part of the lessor, on his default, his lessee may abandon or recoup. *Crane v. Hardman*, 4 E. D. Smith, 339; *Fisher v. Barrett*, 4 Cush. 881. In the case of *Meeks v. Bowerman*, the N. Y. Com. Pleas applied the doctrine of *caveat emptor* to the taking of a lease by a tenant. This doctrine was fully sustained in *McGlashan v. Tallmadge*, 87 Barb. 318; and lessee can only abandon in cases of fraud, *Keates v. Cadogan*, 10 C. B. 591; *Gott v. Gandy*, 2 Ellis & B. 845; and where lessor knew of defects it was no fraud not to disclose them. *Hazlett v. Powell*, 30 Pa. St. 293. The rule stated in the text, that there is no implied warranty of fitness in a lease, is entirely reversed in Louisiana, where it is held that a lessor is bound to indemnify the lessee against all the vices and defects of the leased premises, though he knew nothing of them at the time of making the lease, and even where they have arisen since. *Perrett v. Dupré*, 8 Rob. La. 52.

§ 382. Rent being an equivalent for an interest enjoyed, a covenant for its payment cannot be enforced, *if no estate passed under the lease*, and the tenant has not occupied the premises, since there is no legal consideration for the engagement. As if an attorney grants a lease for another, in his own name, instead of the name of his principal;¹ or if the committee of a lunatic, having no legal authority for that purpose, make leases in their own name;² or whenever the lessor (supposing him competent to demise) has no interest in the premises.³ The same result ensues, whether the lease is void at common law or has been annulled by a statute.⁴ And where a license was granted for a term of years to continue a channel open through the bank of a navigable canal in order that the waste water might pass through the channel to the mills of the grantee on his covenanting to pay a certain annual sum, but it appeared on the trial that the grantors had no legal or equitable estate in the premises professed to be granted, the court held that the grantee or his assignee was not bound by the covenant.⁵

§ 383. The tenant's obligation to pay rent may also be *apportioned*; for, as rent is incident to the reversion, whenever that is severed, either by the act of the parties or by act of law, the rent will follow the reversion, and become payable to the assignees of the respective portions thereof.⁶ But the lessee's consent to the apportionment, when made by the lessor, is necessary to give it validity; unless the proportion of rent chargeable upon each part of the land has been agreed upon between the lessor and his assignee, or, in case of dispute, has been settled by the intervention of a jury.⁷ Such an apportionment is to be made among the several owners of the reversion, or of the rent, according to the value of the several parts held by each, and not according to the quantity or number of acres;⁸ and it is the province of a jury to apportion the rent to the value, according to the evidence produced, unless the parties themselves settle the proportions which are to be collected from each tenant.⁹ But where there is no proof

¹ *Frontin v. Small*, 2 Ld. Ray. 1418; *May v. Trye*, Freem. 447.

² *Knipe v. Palmer*, 2 Wils. 180.

³ *Aylet v. Williams*, 3 Lev. 193.

⁴ *Cleves v. Willoughby*, *supra*; *Jevens v. Harridge*, 1 Saund. 6; *s. c.* 2 Keb. 102, 116.

⁵ *Earl of Portmore v. Bunn*, 1 B. & C. 694.

⁶ *Nellis v. Lathrop*, 22 Wend. 121;

Daniels v. Richardson, 22 Pick. 569; *Crosby v. Loop*, 13 Ill. 625, 627.

⁷ *Bliss v. Collins*, 5 B. & A. 876; *Roberts v. Snell*, 1 M. & G. 577.

⁸ *Van Rensselaer v. Gallup*, 5 Den. 454; *Same v. Bradley*, 3 *id.* 135.

⁹ 3 Kent, Com. 470; *Cuthbert v. Kuhn*, 3 Whart. 857; *Farley v. Craig*, 6 Halst. 262; *McElderry v. Flannagan*, 1 Har. & G. 308.

of value, the apportionment will be according to the quantities.¹ Where the lessor is entitled only to an apportioned part of the rent, an action for its recovery need not be confined to that part, but he may sue for the whole amount, and recover as much as, in the opinion of the jury, he ought to have, and will be barred as to the residue.²

§ 384. An apportionment of rent follows necessarily only upon an alienation of the reversion in parcels by the lessor; for the tenant cannot by assigning relieve himself of his liability on his contract;³ but he can transfer his privity of estate to the extent of the parcel assigned, and as his assignee succeeds to his liability on this ground, the lessor has a double remedy against lessee on his privity of contract and assignee on the privity of estate.⁴ Nor can one of two joint tenants of a lease discharge or apportion his liability, by assigning over to the other; for the lessees, by their own act, cannot divide the rent, so as to put the lessor to several remedies for it.⁵ But, whenever a reversion is severed by act of law, there will be an apportionment of rent without the consent of the tenants. Thus upon a descent of the reversion among heirs, or on a judicial sale of part of the demised premises, the tenant will have two landlords, and bound to pay rent to each for the portion of the premises belonging to them respectively.⁶ So if a landlord dies leaving a widow, she will have a right to receive one-third of the rent, while the remaining two-thirds will be payable to his heirs.⁷

§ 385. Various other instances of apportionment, by act of law,

¹ *Van Rensselaer v. Jones*, 2 Barb. 643.

² *Walter v. Maunde*, 1 Jac. & W. 181. Where land in possession of a tenant for years is conveyed by deed, the right of a purchaser of the reversion to receive the whole rent of the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between assignor and assignee. *Flinn v. Calow*, 1 M. & G. 589.

³ *Rushden's case*, *Dyer*, 4, b; *Broom v. Hore*, Cro. El. 633.

⁴ *Stevenson v. Lambard*, 2 East, 575.

⁵ *Bailiff of Ipswich v. Martin*, 1 Rol. Abr. 235, l. 35. Where several persons being the owners of land chargeable with rent, as tenants in common, make a voluntary partition among themselves, each assuming the payment of his equitable share of the rent, a release to one of the owners will not extinguish the liability of

another, and the land of each still remains chargeable with the rent; but, as between themselves, each is liable to the other for any amount he may be compelled to pay beyond his proportionate share. *Van Rensselaer v. Chadwick*, 24 Barb. 383. And if a portion of the lands so partitioned comes to the possession of a third person, he is also liable as assignee of the lessee. *Van Rensselaer v. Gifford*, *ib.* 349. An assignee is liable to pay the whole rent when it becomes due, and cannot collect a portion of it from his assignor, the lessee; for, in the absence of a special agreement, the rent cannot be apportioned between them. *Graves v. Porter*, 11 Barb. 592.

⁶ *Cole v. Patterson*, 25 Wend. 456; *Co. Lit.* 148, a; *Wotton v. Shirt*, Cro. El. 742.

⁷ 1 Rol. Abr. 237, b, 12, Apportionment; *Ewer v. Moyle*, Cro. El. 771.

may be mentioned. Thus if a landlord enters upon part of the land for a forfeiture, he is only entitled to the proportion of rent due for the other part.¹ Or if the tenant surrenders part of his estate to the lessor, the rent will be apportioned, and payable only in respect to the residue of the premises;² and if he be evicted from part by force of a paramount title, there will be no suspension of the whole rent, but it will be apportioned and payable only for the residue.³ As between the lessor and an assignee of the lessee, where the lessor's right to rent depends solely upon the privity of estate, an eviction out of part will not suspend the rent *in toto*, but the assignee will be liable for rent, payable in respect to the residue of the lands demised.⁴ Yet if the eviction be from part of the thing demised, out of which no rent issues, it will not produce a suspension of any part of the rent.⁵ And if, at the time of entry by the lessee, part of the land is in the possession of a third party, under a prior demise from the same landlord, extending beyond the period of the second demise, the demise of the part leased to another will be wholly void, and the rent will not be apportionable, nor will the lessor be entitled to distrain for the rent, or any part of it.⁶

§ 386. Where the lessee has been once evicted, the rent will be suspended for the future, although the obstacle to his re-entry be removed. As where a defendant pleaded, that the lessor entered *and held him out*, it was determined that the entry of the lessor was enough to satisfy the averment of holding out, and that it suspended the rent, although it appeared that the lessor retired from the land immediately after the lessee's eviction.⁷ So in a case where a lessee took possession of a farm, under an agreement,

¹ Walker's case, 8 Co. 22.

² Smith v. Malings, Cro. Jac. 160.

³ Ibid.; Co. Lit. 148; Walker's case, *supra*.

⁴ Stevenson v. Lambard, *supra*.

⁵ Sanderson v. Harison, Cro. Jac. 679. So Williams v. Hayward, 1 Ellis & E. 1040, where the eviction was of a railway, parcel of the demise, because this was an easement only, and no rent issued therefrom. So Watts v. Coffin, 11 Johns. 495.

⁶ Neale v. Mackenzie, 1 M. & W. 747; see the doctrine of an equitable apportionment of rents, fully stated in Story's Eq. Jur. §§ 475-485, and see, *post*, § 448.

⁷ Cibul v. Hill, 1 Leon. 110. Under a covenant in a lease that if the landlord re-enter for non-payment of rent, he might

relet the premises as the tenant's agent, and that the tenant should be liable for any deficiency, if the landlord re-enters and relets, and brings an action for the deficiency, before the rent, under the new lease, becomes due, he can only recover the difference between the rent reserved by the original lease, and the rent agreed to be paid by the tenant. By commencing the action before waiting to see if the new tenant pays the rent he agrees to pay, he assumes the hazard of his default. In such an action, the landlord cannot recover for the expenditures made by him upon the premises after the re-entry, although by reason thereof, he was enabled to relet at an enhanced rent. Hackett v. Richards, 18 N. Y. 188.

which his landlord, in a material point, failed to fulfil, and occupied the premises for a year; at the expiration of which time the landlord sued him for the full amount of the rent; the court were of opinion that the agreement between them was only evidence of the amount of rent to be paid, where the tenant had occupied under such agreement; but that, in the present instance, the landlord having failed to fulfil the agreement, in the chief object which had induced the lessee to propose becoming a party to it, the tenant could not be said to hold the farm under the agreement; and that, therefore, the landlord was not entitled to recover the full amount of rent, but only so much as the jury should think the tenant ought to pay, under all the circumstances of the case.¹ Where part of the land is lost to a tenant by the act of God, he is not liable for the whole rent; as if the sea break in and overflow a part of the land; in which case, although the soil remains to the tenant, he cannot appropriate the fishery, which is its only use, to his exclusive enjoyment, the sea, the common highway of nations, being open to every one. But a distinction is made between the sea and fresh water; because, though the land be covered with fresh water, the right of taking fish there is exclusively vested in the lessee, and therefore there will be no deduction of rent in this event.²

§ 387. It is also well settled, that, in all cases of periodical payments, accruing at intervals, and not *de die in diem*, there can be no apportionment.³ If, therefore, a tenant is evicted at any time before the rent becomes due, it is not payable at all. As, if there be a lease for a term of years, with rent payable annually, and, before the expiration of the year, the lessee be evicted, the lessor shall have no rent;⁴ or if the rent is payable quarterly, and the tenant be turned out before the end of a quarter the landlord loses the rent of the current quarter, for rent will not be apportioned in respect of time.⁵ And a similar result follows upon a voluntary

¹ Tomlinson v. Day, 2 Br. & B. 681. Where a lease granted land and an easement upon other land of the grantor, with a covenant for the quiet enjoyment of the whole, the tenant, on a partial eviction from the easement under title paramount, is entitled to an abatement of the rent. Blair v. Claxton, 18 N. Y. 529.

² 1 Rol. Abr. 236, l. 46; Richard le Taverner's case, Dyer, 56, a.

³ Clapp v. Astor, 2 Edw. Ch. 379; Wilson v. Harman, 2 Ves. sr. 672.

⁴ Bank of Penn. v. Wise, 3 Watts, 394; Countess of Plymouth v. Throgmorton, 1 Salk. 65.

⁵ Zule v. Zule, 24 Wend. 76; Clun's case, 10 Co. 128; Wood v. Partridge, 11 Mass. 488; Fitchburg Co. v. Melven, 16 id. 268. So where the lease was terminated between rent days in pursuance of a power reserved in the lease so to do. Nicholson v. Munigle, 6 Allen, 215; Fuller v. Swett, 6 id. 219 n.

surrender of the lessee, or his assignee, to the landlord, before the rent of the current quarter becomes payable.¹ For this reason, at common law, if a tenant for life makes a lease for years, rendering a yearly rent, and died in the course of the year, the rent could not be apportioned, and his tenant would go free of rent for the first part of the year, since it was an entire contract, which could not be apportioned.² But the statute of 11 Geo. II. c. 19, first applied a remedy to cases of this kind; and the Revised Statutes of New York, following the English statute, declare: "When a tenant for life, who shall have demised any lands, shall die on or after the day when any rent became due and payable, his executors or administrators may recover from the under-tenant the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death."³ But this provision applies only to leases made by the tenant for life, and not to those made by the testator; and therefore a devisee for life of the income of real estate, leased for a term of years, is entitled only to the rents falling due in his lifetime; and if he dies between two quarter days, the rent cannot be apportioned.⁴

§ 388. An eviction consists in taking from a tenant some part of the demised premises of which he was in possession, not in refusing to put him in possession of something, which, by the agreement, he ought to have enjoyed; the omission of a landlord, therefore, to perform such covenants, does not amount to an eviction, and is no bar to the lessor's claim for rent; the lessee's remedy is by an action to recover damages for a breach of the covenant.⁵ Yet, where the landlord let an unfinished house, and agreed to finish it by a certain day, but did not, it was held that the tenant was not bound to occupy the house; although if he had occupied it, it was conceded he would have been bound to pay the stipulated rent, for that possession subjects a tenant to the payment of rent, unless there has been an eviction.⁶ Neither can a lessee claim a deduc-

¹ *Young v. Peyser*, 3 Bosw. 308.

² *Clun's case*, *supra*; *Jenner v. Morgan*, 1 P. Wms. 392; *Cutter v. Powell*, 6 T. R. 820; *Perry v. Aldrich*, 18 N. H. 348.

³ 1 R. S. 747, § 22.

⁴ *Stillwell v. Doughty*, 3 Bradf. 859. Where a lease continues beyond the termination of the life-estate, the rent belongs to whomsoever has the estate on the rent

day, and there can be no apportionment thereof between the tenant for life and the remainder-man. *Marshall v. Moseley*, 21 N. Y. 280.

⁵ *Etheridge v. Osborn*, 12 Wend. 529.

⁶ *Allen v. Pell*, 4 Wend. 505. So *Wright v. Lattin*, 88 Ill. 292; where the condition precedent of repair by the lessor was waived by lessee's entry.

tion from the stipulated rent, by reason of a contemporaneous parol agreement to make improvements during the term, which would render the use of the demised premises more valuable; such an agreement cannot be shown in any case, where there was no fraud in making the lease, or in obtaining its execution.¹ So where a lessor commanded the breaking of a partition wall in the house demised, it was held not to amount to a re-entry.² And where a lease was executed of three rooms in a building, together with a landing on a navigable canal, embracing a front of two hundred feet, and the lessee covenanted to pay a certain annual rent, *so long as he should be permitted to occupy the premises*, it was held that the destruction of the rooms by fire was not embraced in the qualification contained in the covenant; and, to entitle the defendant to a discharge from the rent, he should have shown a surrender of the *whole* of the premises; for that, while he remained in possession of any portion of the premises, he could claim only a *pro rata* reduction of rent for such part only as had been destroyed.³

§ 389. Any other mere entry upon the premises by the landlord, *without an eviction*, does not discharge the rent; for the landlord, in such case, is only a trespasser.⁴ And where a landlord, owning a lot adjoining the demised premises, built a house on such lot so as to cut off the tenant's light and air, the obstruction was held not to amount to an eviction.⁵ But where a party, after executing leases of portions of his farm to several tenants, granted the whole farm, with the reversion of the demised premises, to a tenant in fee, reserving an annual rent, and after such grant entered upon the premises, and distrained the goods of the original tenants, for rent accrued subsequent to the grant of the whole estate; such entry and distress were held equivalent to an eviction of the principal tenant, and produced a suspension of the rent.⁶

§ 390. With respect to the person to whom rent is payable, it is

¹ *The Mayor v. Price*, 5 Sandf. 542; *Tibbits v. Percy*, 24 Barb. 39.

² *Harrison's case*, Clayt. 34; *Smith v. Raleigh*, 3 Camp. 513.

³ *Willard v. Silliman*, 19 Wend. 358. So where, before the first of May, a person leased a store and dwelling for one year from that day, rent payable quarterly in advance, the store and dwelling to be erected and completed by that day, the upper story to be finished into a dwelling; and the tenant entered into possession and remained until the second quarter's rent fell due, and then abandoned the premises;

it was held to be no objection to the collection of rent, that the premises were untenable, in consequence of the building not being completed by the landlord according to the agreement. *Nichols v. Dusenbury*, 2 N. Y. 283.

⁴ *Wilson v. Smith*, 5 Yerg. 379.

⁵ *Palmer v. Wetmore*, 2 Sandf. 316; *Myers v. Gemmel*, 10 Barb. 537. Undermining the tenant's wall, by an adjoining owner, is no excuse for the non-payment of rent. *Kramer v. Cook*, 7 Gray, 550.

⁶ *Lewis v. Payn*, 4 Wend. 423.

scarcely necessary to observe that every tenant is responsible to his immediate landlord, in the first instance; but an under-tenant, in order to protect his possession, may always pay to the original lessor. And it is not necessary for his protection, that the original lessor should threaten a suit, or even demand the money; the right of the landlord to sue for rent, or to re-enter, is sufficient to render the payment compulsory.¹ If a lessor, being owner of the fee, dies, after rent has become due, it is payable to *his executor or administrator*, and not to the heir-at-law; but if he dies before the rent accrues, it belongs to the heir, and not to the executor or administrator.² An illustration of the principle applicable to this subject, occurs in a case, where a tenant for life, having granted leases in conformity to his power, died before midnight, though after sunset, on the rent-day, and the remainder-man was declared to be entitled to the rent, because it followed the reversion, which descended to the heir before the rent became due.³

§ 391. As to the time when rent is due, we observe, that by the old law it was due and payable before sunset of the day whereon it was to be paid; on the reasonable ground that sufficient light should remain to enable the parties to reckon the money; for, anciently, the day was accounted to begin only from sunrise, and to end immediately upon sunset.⁴ But Lord Hale laid down the law, which has been followed since his day, that although sunset was the time appointed by law to demand rent, in order to take advantage of a condition of re-entry in case of its non-payment, and to tender it in order to save a forfeiture, yet that, in strictness, the tenant has all the day to pay it, and that it is not due until midnight, or the last minute of the natural day, whereon it is made payable.⁵ If, therefore, the tenant is evicted by his landlord on the day the rent is payable, it will operate as an extinguishment of the whole rent.⁶ The day of payment depends upon the contract; but is sometimes regulated by custom. It may be made payable in advance;⁷ and if there is no special agreement to the contrary,

¹ *Peck v. Ingersoll*, 7 N. Y. 528; see, *ante*, § 155.

² *Cole v. Patterson*, 25 Wend. 456; *Duppa v. Mayo*, 1 Saund. 287; *Barwick v. Foster*, Cro. Jac. 227; *O'Bannon v. Roberts*, 2 Dana, 54. *Dixon v. Niccolls*, 39 Ill. 872. So if an administrator collects rent, he holds it in trust for the heirs. *Robb's Appeal*, 41 Pa. St. 45; *King v. Anderson*, 20 Ind. 385; *Mills v. Merryman*, 49 Me. 65. So where

rent is payable in kind. *Cobel v. Cobel*, 8 Pa. St. 342; *Burns v. Cooper*, 31 *id.* 428.

³ *Norris v. Harrison*, 2 Madd. 268.

⁴ Co. Lit. 202, a. For the requirements of a common-law demand, see, *post*, § 493.

⁵ *Duppa v. Mayo*, *supra*.

⁶ *Smith v. Shepard*, 15 Pick. 147.

⁷ *Giles v. Comstock*, 4 N. Y. 270; *Conway v. Starkweather*, 1 Den. 118. A lease was to run "from the first day of

payment would be due, either yearly, half-yearly, or quarterly, according to the usage of the country, and the presumed intention to conform to it. If there be no usage or agreement in the case, rent is not due until the end of the term.¹ But we have seen, that, in the city of New York, in the absence of any special agreement, rent is payable on the usual quarter days, by statute.² When payable in money, interest is allowed to be recovered upon rent in arrear from the time it became due, at least in New York, Pennsylvania, and Maryland;³ and such is believed to be the general rule. But in North Carolina, it is held not to be recoverable by way of damages, in an action of debt for rent,⁴ nor in Louisiana, except from the time of the judicial demand.⁵ While in New York it was held, that in a covenant for non-payment of rent, on a lease reserving a certain number of bushels of wheat, and a number of fowls annually, the plaintiff is entitled, as matter of law, to interest on the value of the property after the time, when, by the terms of the lease, it should have been delivered.⁶

§ 392. In regard to the place of payment, it is to be observed, that, when rent *in kind* is payable by the terms of the lease at such a place, in a market town, as the lessor shall appoint, *and no*

April next," for five years "next ensuing," rent payable in equal quarterly payments, to wit: on the first days of April, July, October, and January, in each and every year" during the term. The premises were a brickyard, and the lessees covenanted to have at all times on the premises brick enough to secure one quarter's rent; and in default of payment the lessor might either retake possession, or enter and sell enough brick to pay arrears. *Held*, that all these provisions showed a careful design to give the lessor the amplest security possible, and that the word "from" must be construed to include the first day of April, and that the rent was payable on that day in advance. *Deyo v. Bleakley*, 24 Barb. 9.

¹ 3 Kent, Com. 374; *Menough's Appeal*, 5 W. & S. 482. So where rent is payable in kind. *Dixon v. Niccolls*, 39 Ill. 372; *Lamberton v. Stouffer*, 55 Pa. St. 284. If rent is payable quarterly, nothing is due until the time stipulated for payment arrives. *Wood v. Partridge*, 11 Mass. 488; *Fitchburg Co. v. Melven*, 15 *id.* 268. If the lease specifies no particular time of payment, an agreement to pay quarterly may be inferred, from the fact that the lessor had demanded it quarterly, and the tenant had frequently

so paid it. *L. I. R. R. Co. v. Marquand*, 6 N. Y. Leg. Obs. 180. In a reservation of rent "payable in quarterly or monthly payments," it was held that the alternative was for the benefit of the landlord, and not of the tenant. *Pemberton v. Van Rensselaer*, 1 Wend. 307.

² Under a lease in the city of New York, from the first of October to the first of May, at a yearly rent, payable quarterly, it was held that the rent was payable on the usual quarter days, i. e., one month's rent on the first of November, and thenceforth quarterly. *Wolf v. Merritt*, 21 Wend. 386. Otherwise held of a lease from the tenth day of the month, for a term of years to end on the first day of the month. *Curtiss v. Miller*, 17 Barb. 477.

³ *Clark v. Barlow*, 4 Johns. 188; *Obermyer v. Nichols*, 6 Binn. 159; *Dorrill v. Stevens*, 4 McCord, 59; *Dennison v. Lee*, 6 Gill & J. 388. A tender of money does not extinguish the debt: it merely stops the running of interest. *Raymond v. Bearnard*, 12 Johns. 274; and see 2 N. Y. R. S. 554, § 20, and *Brown v. Ferguson*, 2 Den. 196.

⁴ *Cooke v. Wise*, 3 Hen. & M. 468.

⁵ *Perret v. Dupré*, 19 La. 341.

⁶ *Van Rensselaer v. Jewett*, 5 Den. 185; s. c. 2 N. Y. 185.

appointment has been made, it is the duty of the lessee to seek the lessor, ascertain the place of payment, and there deliver his rent. If the landlord cannot be found, a delivery anywhere within the market town would be sufficient. And whether payable in money, or in kind, if no place of payment is specified, a tender of either upon the land is good, and prevents a forfeiture.¹ Although the tenant is under no obligation to go and seek the landlord, provided the contract is silent as to the place of payment, a personal tender to him anywhere is held to be sufficient.² And when payable in kind at such place as the lessor shall from time to time appoint, the lessor may sustain an action on the lease, for the value of the rent, without averring or proving that he directed the lessee where to deliver it. But upon such a lease, if the lessor gives directions where to make the payment, the lessee must be prepared to pay according to the directions.³

§ 393. A *tender of money* is its actual production and manual offer to the party entitled to payment. It is not enough for the party to say, I am ready to pay the debt, or perform the duty; but he must make an actual offer to pay the one or discharge the other.⁴ He must declare on what account it is made; and actually produce the money, and not keep it in his pocket; but he may offer a bag with the money in it, and it is then the creditor's duty

¹ *Lush v. Druse*, 4 Wend. 313; *Walter v. Dewey*, 16 Johns. 222; *Van Rensselaer v. Jones*, 5 Den. 453. The effect of a valid tender of specific articles, where, by the terms of the contract, payment is to be so made, is to discharge the debt, and to transfer the ownership of the articles tendered to the creditor, notwithstanding he may refuse to accept it. *Des Arts v. Leggett*, 16 N. Y. 582; *Lamb v. Lathrop*, 13 Wend. 95. Thenceforth the lessee holds them as bailee, at the risk and expense of the other party. *Sheldon v. Skinner*, 4 Wend. 525; *Slingerland v. Morse*, 8 Johns. 477.

² *Walter v. Dewey*, *supra*; *Slingerland v. Morse*, *supra*; *Hunter v. Leconte*, 6 Cow. 728; *Soward v. Palmer*, 8 Taunt. 277; *Tinckler v. Prentice*, 4 *id.* 549.

³ *Livingston v. Miller*, 8 N. Y. 283; s. c. 11 *id.* 80. In general, the taking of a bill or note in payment of a debt does not operate to discharge the debt, unless it is so expressly agreed by the parties, *Murray v. Gouverneur*, 2 Johns. Cas. 438, or unless the creditor negotiates the note. *Herring v. Sanger*, 8 Johns. Cas. 71. It

merely postpones the time of payment of the debt, and if not paid, it may be returned, and the original debt resorted to. *Tobey v. Barber*, 5 Johns. 68. But in Massachusetts, Maine, and Vermont, the negotiable note of the debtor is presumed to be payment and discharge of a simple contract debt. But where the lease is under seal, *quere*. See 2 Parsons, Bills, &c., 150. So the accepting of a sealed obligation for rent does not extinguish it, nor affect the right to distrain for it. 8 Bac. Abr. 82, 107; *Newport v. Godfrey*, 4 Mod. 44; s. c. 12 *id.* 7. Whether it arises on a parol lease, or by indenture. *Cornell v. Lamb*, 20 Johns. 407; s. c. 2 Cow. 652. Or is secured by a chattel mortgage. *Lofsky v. Maujer*, 3 Sandf. Ch. 69. See, *post*, § 566; and generally as to a discharge of the obligation to pay rent, see the various actions for rent treated of in Chap. XIII.

⁴ *Bakeman v. Pooler*, 15 Wend. 687; *Sheredine v. Gaul*, 2 Dall. 190; *Horn v. Luines*, 12 Mod. 353; *Dunham v. Jackson*, 6 Wend. 22. No tender, if the money has been fraudulently obtained. *Iteed v. Bank of Newburgh*, 6 Paige, 387.

to examine and count it.¹ The actual production of the money, however, may be dispensed with by the conduct of the creditor; as if he absolutely refuses to receive it, or if he objects to receive it, because it is too much, or because it does not amount to the debt due, together with another debt which he also insists on receiving, or where he tells the party he need not produce the money.² But the circumstance of demanding more than is due, is not sufficient to excuse an actual tender of what is due.³ It must also be without qualification or condition, or an intention of cutting off some other claim beyond the amount tendered; as if the debtor, at the time of the tender, demands a receipt in full for all demands; although he may ask a written receipt or acknowledgment for the amount paid.⁴ The tender must ordinarily be made directly to the creditor; and if made to an agent or other person, it must be shown that he had authority to receive it.⁵

§ 394. *As to a tender of specific articles*, the authorities agree, says Judge Cowen, in his treatise on the Justices' Courts, that the party making the tender must do every thing in his power to place himself in a state of perfect readiness to perform, or the tender will not be complete, whether the creditor be present or not.⁶ It is a general rule, also, that where any act yet remains to be done by the purchaser to prepare the goods for delivery, until this is done, the property does not pass, and the essential object of identifying the goods, and giving the vendee a remedy for them, by caption, trover, or other action to obtain the goods, or the value of them, is not yet obtained. This is essential, for the party is not to be deprived of all remedy upon his contract, unless another remedy is furnished him by passing the property of the

¹ *Bakeman v. Pooler*, *supra*; *Dickinson v. Shee*, 4 Esp. 68; *Glancott v. Day*, 5 *id.* 48; *Sheredine v. Gaul*, *supra*; *Wade's case*, 5 Co. 115; 1 Inst. 208; *Firth v. Purvis*, 5 T. R. 482.

² Cow. Treatise, 794; *Douglas v. Patrick*, 3 T. R. 688; *Black v. Smith*, Peake, 88; *Stone v. Sprague*, 20 Barb. 509; *Holmes v. Holmes*, 12 *id.* 187; *Vaupell v. Woodward*, 2 Sandf. Ch. 148.

³ *Dunham v. Jackson*, 6 Wend. 22; *Thomas v. Evans*, 10 East, 101; *Kraus v. Arnold*, 7 Moore, 59.

⁴ *Wood v. Hitchcock*, 20 Wend. 47; *Ryder v. Townsend*, 7 Dow. & R. 119; *Fishburne v. Saunders*, 1 Nott & M. 242. A tender upon condition that certain securities shall be surrendered, to which the debtor is not entitled, or that the holder

of the obligation will ratify an arrangement made concerning another matter, is in either case bad. *Brooklyn Bank v. Degrauw*, 23 Wend. 842; *Eddy v. O'Hara*, 14 Wend. 221.

⁵ *Hornby v. Cramer*, 12 How. Pr. R. 490; *Smith v. Smith*, 2 Hill, 851; *Hargous v. Lahens*, 3 Sandf. 218. If the creditor, knowing the day on which payment ought to be made, voluntarily absents himself from home on that day, under circumstances indicating an intention to avoid the debtor, a tender by the latter to any person whom he may find at the creditor's house, is good. *Judd v. Ensign*, 6 Barb. 258; *Smith v. Smith*, 25 Wend. 405.

⁶ *Clark v. Tyson*, 1 Stra. 504; *Coit v. Houston*, 3 Johns. Cas. 253, per Radcliff, J.

chattels, and placing them completely under his control.¹ Strictly, a tender must be made in gold and silver coin made current by acts of Congress of the United States.² Such coin as is issued from the mint may be counted, and the creditor must take it according to its nominal value. But with regard to foreign coin, the creditor may decline to receive it, except by its true weight and value.³ Bank-notes constitute a part of the currency of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money; and they are a good tender as money, unless specially objected to by the creditor at the time of the offer.⁴

¹ Cow. Treatise, 796; McDonald v. Hewett, 15 Johns. 851; Whitehouse v. Frost, 12 East, 621; Wallace v. Breeds, 13 id. 522; Nichols v. Whiting, 1 Root, 448; Newton v. Galbraith, 6 Johns. 119.

² By the Act of Congress, of March 8, 1868, treasury notes of the United States were made legal tender, and it was repeatedly held under this act that all contracts, including those specifically agreeing for gold or silver coin, could be discharged either in law or equity by these notes at par. Thomson v. Riggs, 5 Wall. (U. S.) 663; Frothingham v. Morse, 45 N. H. 545; Wood v. Bullens, 6 Allen, 516; Buchegger v. Shultz, 18 Mich. 420; Graham v. Marshall, 52 Pa. St. 28; Thayer v. Hedges, 23 Ind. 141; Whetstone v. Colley, 36 Ill. 328; Henderson v. McPike, 35 Mo. 255; Rhodes v. Bronson, 34 N. Y. 649. But where the contract was for gold or silver, not as money, but by weight, it became a commodity, and not currency, and could only be satisfied by gold or silver, or by currency with the premium added; Essex Co. v. Pacific Mills, 14 Allen, 889, where a perpetual annual rent was reserved of 260 ounces of silver of a specified fineness. So Dutton v. Pailaret, 52 Pa. St. 109; Sears v. Dewing, 14 Allen, 418. And the former class of cases are now overruled by the Supreme Court of the United States, in Bronson v. Rhodes, in error, from New York, 3 Am. Law Rev. 565, which held that contracts specifically for coin are only dischargeable in coin or in currency with the premium; and this was followed in Butler v. Horwitz, 3 Am. Law Rev. 572.

³ Cow. Treatise, 798. Spanish milled dollars, and their proportional parts, were declared current in the United States, and

a legal tender, by Act 10 April, 1806. The dollar of Mexico, Peru, Chili, and Central America, Bolivia, and Spanish pillar dollars of the requisite weight and fineness, are receivable by tale in payment of debts for one hundred cents each; and the five-franc piece of France for ninety-three cents; by Act 8 March, 1843; Act 25 June, 1884. The gold coins of Great Britain at 94 6-10 cents per pennyweight; of France, at 92 9-100 cents per pennyweight, by Act of 8 March, 1843; and the gold coins of Portugal and Brazil, 22 carats fine, at 94 8-10 cents per pennyweight; and of Spain, Mexico, and Columbia, 20 carats 8 7-16 grains fine, at the rates of 89 9-10 cents per pennyweight, by Act of 28 June, 1884, are made current and receivable by weight, for the payment of all debts and demands. Gold coins are to be received at their respective values, for debts of any amount. Half dollars and other minor denominations of silver for debts under five dollars; and cents only for dues under ten cents.

⁴ Per Story, J., U. S. Bank v. Bank of Georgia, 10 Wheat. 347. Counterfeit notes, or notes which prove to be of no value, are no payment, although they were paid in good faith, and supposed to be genuine. Markle v. Hatfield, 2 Johns. 455; but see Benedict v. Field, 4 Duer, 154. When a bank stops payment, its bills cease to be a representative of the legal currency, whether the holder is aware of the suspension or not. If such bills are passed to one who is ignorant of the failure of the bank, they are no payment. Ontario Bank v. Lightbody, 18 Wend. 101. That the creditor may return a counterfeit bank-note, in a reasonable time. Thomas v. Todd, 6 Hill, 340.

SECTION III.

THE COVENANT TO PAY TAXES, CHARGES, AND ASSESSMENTS.

§ 395. As far as the public is concerned, it is a general principle that the tenant is to pay all taxes imposed on the premises; the land itself, in the hands of the occupant, is debtor to the public, and *prima facie* it is the tenant's tax, because all the remedies are against him. He is, therefore, for his own protection, authorized to pay such taxes, as well as assessments for public improvements, when demanded, and to charge them to account of rent; unless it is clearly a part of his agreement that he shall pay the taxes as part of, or in addition to the rent.¹ For, as between landlord and tenant, the landlord is bound, as we have seen, to indemnify the tenant against all such charges as he has been obliged to pay, and for which the landlord was primarily liable.² Whenever, therefore, a tenant advances the tax, ground-rent, assessment, or other prior charge on the land, he may look to the landlord again for it, and recover the amount paid, in an ordinary suit at law, or deduct it out of the rent, unless it is provided by the lease that the tenant shall pay it.³ Nor is it necessary, for the purpose of rendering the payment an involuntary one, that the superior lord should threaten to distrain; for a demand by one who has power to enforce his claim, is equivalent to a compulsion; and such a payment, to use the words of Best, C. J., is no more voluntary than a donation to a beggar, who presents a pistol.⁴ And, if the sum paid by the tenant exceeds the rent due to the landlord, it will create an obligation on the part of the landlord to repay such excess, as money paid by the tenant to his use.⁵

§ 396. According to the English law, a tenant must deduct each year's tax from each year's rent; for if the deduction is not made from the rent of the current year, the tenant will not be allowed

¹ Tinklen v. Prentice, 4 Taunt. 549; Gabell v. Shevell, 5 Taunt. 81. It would seem, that in Maryland, if no mention is made of taxes in the lease, they are payable by the tenant, and do not constitute a set-off to the payment of rent. Hughes v. Young, 5 Gill & J. 67.

² Sapsford v. Fletcher, 4 T. R. 511; Stubbs v. Parsons, 3 B. & A. 516. And see, *ante*, § 341.

³ 1 N. Y. R. S. 410, § 78; 419, § 6; Hunt v. Amidon, 4 Hill, 349; Taylor v. Zamira, 6 Taunt. 524; Clennell v. Read, 7 Taunt. 50; Dawson v. Linton, 5 B. & A. 521; Garner v. Hannah, 6 Duer, 282.

⁴ Carter v. Carter, 5 Bing. 406.

⁵ Per Burroughs, J., in Taylor v. Zamira.

to deduct, in any subsequent year, the amount of the tax so omitted to be deducted.¹ Thus, where an occupant of lands, having, during a course of twelve years, paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid; he was not permitted to set off any part of the property-tax so paid, in the landlord's action for rent.² In the case referred to, however, it was held, that the statute *required* the tenant to deduct those payments out of the rents of the then current years, and that for that reason they could not be *set off* against subsequent demands of rent by the landlord; but the court expressly say, that such payments are still recoverable by the tenant in a separate action for *money paid* to the landlord's use, because of the landlord's liability to indemnify the tenant against such payments at common law.

§ 397. But this restriction of the tenant's right to deduct the taxes only from the current year's rent, does not exist in the New-York statute, which declares, "When the tax on any real estate shall have been collected of any occupant and tenant, and any other person, by agreement or otherwise, ought to pay such tax, or any part thereof, such occupant or tenant shall be entitled to recover, by action, the amount which such person ought to have paid; or to retain the same from any rent due, or accruing from him, to such person, for the land so taxed." The same statute also enacts, "Where any district tax, for the purpose of purchasing a site for a school-house, or for purchasing or building, keeping in repair, or furnishing such school-house with necessary fuel and appendages, shall be lawfully assessed and paid by any person, on account of any real property whereof he is only tenant at will, or for three years, or for a less period of time; such tenant may charge the owner of such real estate with the amount of the tax so paid by him, unless some agreement to the contrary shall have been made by such tenant."³

§ 398. A covenant by a tenant to pay all rates, which, during the term, should be assessed upon the premises, *except the land-tax*, means to except the land-tax which the landlord is obliged to pay; and therefore the tenant must pay the additional tax occasioned by

¹ *Stubbs v. Parsons*, 3 B. & A. 516;
Andrew v. Hancock, 1 Brod. & B. 37;
Spragg v. Hammond, 2 *id.* 69.

² *Denby v. Moore*, 1 B. & A. 123.
³ 1 R. S. 419, § 4; *ib.* 483, § 88.

an improvement of the premises.¹ But a tax on the rent reserved by the lessor is not a tax upon the premises which a tenant is bound to pay upon such a covenant.² In a case where a tenant took a village lot for twenty-one years, and covenanted to pay all taxes, charges, and impositions which should be imposed upon the premises, and during the term the premises were subjected to an assessment for regulating and paving a street, under an act incorporating the village and authorizing such assessment, passed subsequent to the making of the lease; the court held, that by the terms of the covenant the tenant was liable to pay the assessment, although the expenditure was for a permanent benefit, extending beyond the term.³ So where a lessee covenanted to pay all assessments for which the property should be liable, he was held bound to pay an assessment subsequently imposed for opening a street, although it was not authorized by any law existing at the time the lease was executed.⁴ But an assessment for a supposed benefit to a lot on the opening of a street is not included in the tenant's obligation to pay taxes.⁵

§ 399. As both landlord and tenant *are entitled to damages in the event of property being taken for public improvements*, — the landlord for the value of the land taken, and the tenant for the injury done to the lease, — so, in case they are both benefited by the con-

¹ Hyde v. Hill, 8 T. R. 377.

² Van Rensselaer v. Dennison, 8 Barb. 23.

³ Bleecker v. Ballou, 3 Wend. 263; Mayor, &c., v. Cushman, 10 Johns. 96; Oswald v. Gilfert, 11 id. 443. A lessee covenanted to pay all taxes and assessments, &c.; held that the covenant did not extend to a city assessment upon the landlord for benefit to his reversion from the laying out of a new street contiguous to the property, for which improvement the tenant, according to his interest, was also assessed. Love v. Howard, 6 R. I. 116; Second Univ. Soc. v. Providence, ib. 235. So a stipulation to pay all taxes and keep the sidewalks in repair was held not to extend to the payment of the expenses of paving the street in front of the leased premises. Municipality No. 2 v. Curell, 13 La. 318; Twycross v. Fitchburg R. R., 10 Gray, 293.

⁴ Post v. Kearney, 2 N. Y. 394. Where a lease contained a provision that the lessee should pay "the ordinary and yearly taxes," it was held, that the annual water rent, charged on the premises, according to the rates established by the

Croton Department, is within the meaning of the covenant, and properly to be considered as embraced within that description of taxes. Garner v. Hannah, 6 Duer, 262. Where the lessee's covenant was to pay all "taxes and assessments levied or assessed during the term," a special tax for grading done before the term, but assessed within the term, was held to be included. Shepardson v. Elmore, 19 Wisc. 424. So "all taxes payable during the term," means taxes assessed in the term, though made payable after the term, and not taxes assessed before the term, and made payable in it. Wilkinson v. Libbey, 1 Allen, 375.

⁵ Matter of the Mayor, &c., of N. Y., 11 Johns. 77; Sharp v. Speir, 4 Hill, 76. A co-tenant cannot suffer the land to be sold for taxes, and buy it in and hold it for his own exclusive benefit; such a purchase will enure to the benefit of all the tenants. Van Horne v. Fonda, 5 Johns. Ch. 388; Holridge v. Gillespie, 2 id. 30. He is bound to protect the interest of those who stand in the same relation with himself to the property. Burhans v. Van Zandt, 7 N. Y. 523.

templated improvement, they are both liable to be assessed, in proportion to the benefit they receive. But where a lessee covenanted to pay all taxes and assessments which might be imposed during the term, upon the premises by legal authority, and an improvement was made, which took away part of the leasehold premises; it was held, that the lessee was chargeable with the full amount of the assessment, upon the whole interest of the lessor in such premises.¹ The lessee's covenant runs with the land, and will bind an assignee of the term.²

SECTION IV.

THE COVENANT TO INSURE.

§ 400. A covenant is sometimes inserted in a lease, requiring the tenant to insure the premises; and, in case of damage by fire, to apply the money to be received for insurance, in rebuilding or repairing the premises. Without such covenant, he is under no obligation to effect an insurance; although, if it is a long lease, he might find it prudent to do so for his own protection. The bare covenant to insure is merely personal, extending only to the covenantor and his personal representatives, without binding the assignee of the term, and in general, gives the landlord no right to receive the insurance money from the insurers; but when it contains a clause for reinstating the premises with the insurance money, he may not only require it to be so applied, but it becomes also a covenant, running with the land, enabling the assignee of the reversion to maintain an action for its breach. And a similar effect will be given to this covenant, wherever a statute requires the money to be so applied.³ A covenant to insure and keep insured a given sum of money upon the premises, during the term, in some sufficient insurance office, means that the premises shall be kept insured against fire, in some office where insurances against fire, are usually effected;⁴ not that the lessee should effect any one policy, and keep that particular one on foot; but that he, his executors, and assigns, should always keep the premises insured

¹ *Astor v. Miller*, 2 Paige, 68.

² *Post v. Kearney*, 2 N. Y. 394.

³ *Thomas v. Von Kapff*, 6 Gill & J. 372; *Vernon v. Smith*, 5 B. & A. 1; *Spen-*

cer's case, 5 Co. 17; *Masury v. Southworth*, 9 Ohio St., 340.

⁴ *Doe v. Shewin*, 3 Camp. 135.

by one policy or another, and this covenant will be broken, if the premises are left uninsured, for any time, however short.¹

§ 401. If the tenant covenant to keep the premises in repair, and also to insure them for a specific sum against fire; on their being burned down, his liability on the former covenant is not limited to the amount of the sum insured under the latter, but he is bound to put the premises in as good order as they were, notwithstanding the sum insured may not be sufficient for that purpose.² Where the defendant covenanted to keep the premises insured during the term, and the policy declared that only fifteen days beyond the quarter-day should be allowed for the payment of the premium, and he suffered the fifteen days to elapse before it was paid, but insured afterwards; the court held the covenant broken, for the landlord ran the risk of fire from the fifteenth day to the time the insurance was renewed.³ A forfeiture for the breach of this covenant will not, in general, be relieved against in equity, unless there has been a waiver of such forfeiture by receipt of rent or the like; and, on the non-performance of the covenant, the lessor may enter as for the breach of a condition, if such right has been reserved in the lease, and oust the assignee of the lessee; even although the lessor has distrained for rent, with knowledge of the breach of the covenant, which was a waiver of the breach of condition up to the time of distress; for the subsequent non-insurance is held to be a continuing breach up to that time, and gives a right of re-entry for the forfeiture.⁴

¹ *Doe v. Peck*, 1 B. & Ad. 428. A change of tenants of the insured building, the policy being silent on the subject, does not invalidate the policy, though the first tenant may be a prudent, and the second a grossly careless, man. *Gates v. Madison Ins. Co.* 5 N. Y. 469.

² *Digby v. Atkinson*, 4 Camp. 275.

³ *Doe v. Shewin*, *supra*. Where the covenant requires the tenant to keep the building insured in a certain sum for the benefit of the landlord, an insurance effected by the lessee in his own name is no compliance with the covenant. *Keteltas v. Coleman*, 2 E. D. Smith, 408.

⁴ *Doe v. Peck*, *supra*. As a breach of this covenant by non-insurance is a continuing breach, the receipt of rent by the landlord after the commencement of the non-insurance waives only that portion of the breach which has then actually occurred. *Doe v. Gladwin*, 6 Q. B. 958. In this case, which is a very strong illus-

tration of the rule, the tenant had covenanted to insure the demised premises, and to keep them insured in the joint names of the landlord and of himself, and the lease contained a proviso for re-entry upon the breach of any of the covenants. The tenant insured in his own name only, but he showed the policy to the landlord, who approved of it, and accepted rent during the next three years up to Christmas, 1842. The premium paid by the tenant at that period covered the year 1843. In January, 1843, the landlord assigned his reversion, and in that year, the assignee brought ejectment for the forfeiture caused by the non-insurance in the joint names of the landlord and tenant; and it was held, that the lease was forfeited, although no notice had been given to the tenant to alter the policy. See also, *Penniall v. Harborne*, 11 Q. B. 368; *Doe v. Ulph*, 13 *id.* 204. A breach by failure to insure is a defect in the title,

SECTION V.

THE COVENANT NOT TO ASSIGN.

§ 402. A covenant not to assign or underlet the premises, without the express permission of the landlord, is a covenant on the part of the lessee frequently inserted in a lease; and although it seems to be a reasonable privilege, that a man shall exercise this restraint for the salutary purpose of selecting his own tenants, such as he is satisfied will take care of his property, and pay rent punctually, it is a restraint which courts of law do not favor.¹ In some cases the restriction extends to the whole duration of the term; in others to a limited time only, such as for the last year, or the last two or three years; so, that at all events, the lessor may find, on the determination of the lease, a responsible person in possession of the property, to whom he may look for rent.

§ 403. Covenants of this description are construed by courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation.² If, therefore, the lessee covenants *not to assign, transfer, set over*, or otherwise do, or put away the lease or premises, it does not prevent him from *under-letting*.³ Nor will a covenant "not to let or underlet the whole or any part" of the demised premises preclude an assignment of the whole interest.⁴

though the lessor has taken no advantage of it. *Wilson v. Wilson*, 14 C. B. 616. Nor will equity relieve. *Gregory v. Wilson*, 9 Hare, 683.

¹ *Church v. Brown*, 15 Ves. 265; *Crusoe v. Bugby*, 1 W. Bl. 766. A provision of a similar character exists in many of the major leases in New York, having for at least one of its objects the exclusion of dangerous or improper persons among the landholders. It consists in a reservation to the proprietor of the quarter-sales, and a pre-emption right upon every alienation made by the tenants. Another reason for this reservation in these leases was, that it in fact constituted a part of the consideration of the original purchase of the premises, nothing having been paid by the tenants upon their receiving the grant of their lands from the patroon. All future reservations of fines or quarter-sales are now prohibited in New York, by the Constitution of 1846.

² *Doe v. Carter*, 8 T. R. 61. Thus a covenant not to assign for benefit of creditors is not broken by an assignment not

for creditors. *Philadelphia & E. R. R. v. Catawissa R. R.*, 58 Pa. St. 20. The value of agricultural leases, of the duration of twenty-one years and under, depends so much upon the personal character of the tenants, that the rule in Scotland is, that they cannot be assigned or sublet without the landlord's consent; but the lease of a city tenement is assignable, or may be underlet, unless there be a prohibitory clause. 1 Bell, Com. 75.

³ *Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Harrison*, 17 *id.* 66; *Crusoe v. Bugby*, 3 Wils. 234; *Hargrave v. King*, 5 Ired. Eq. 430.

⁴ *Lynde v. Hough*, 27 Barb. 415. But the authorities are not agreed on this point. In *Den v. Post*, 1 Dutch. 285, a covenant against underletting was declared a bar to assignment. *Greenaway v. Adams*, 12 Ves. 395, was relied on, and in *Woodfall, Landl. & T.* (9th ed.) 568, and *Platt, Cov.* 408, the same view of the latter case is taken. In *Blake v. Sanderson*, 1 Gray, 832; *Shumway v. Collins*, 6 *id.* 227, 230; *Shattuck v.*

But a condition not to *set, let, or assign over* the demised premises, or any part thereof, comprehends *under leases*; for where the condition was, not to let or assign over the premises, or any part thereof, a lease by the tenant, which fell short of his term by only one day, was held to be a breach of the condition.¹ So a covenant not to let, set, or demise the premises, or any part, for all or any part of the term, restrains an assignment.² And where the proviso in the lease was, that "if the lessee, his executors, or administrators, did or should assign, or otherwise part with the lease or the premises thereby granted, or any part thereof, *for the whole or any part of the term thereby granted*, to any person or persons whomsoever, without the license and consent, in writing, of the lessor, first had and obtained for that purpose, the lessor might re-enter;" and the lessee entered into an agreement with another, to grant him a lease of the premises for the residue of the term, reserving a few days under which possession was given, Lord Ellenborough held that the words of the proviso included an under-lease, and that, consequently, such under-lease was a breach of the proviso.³

§ 404. A covenant in a lease in fee, that if the lessee or his assigns should sell, the lessor shall have *the right of pre-emption*, and one-tenth of the purchase-money, was formerly held to be a valid covenant; and the estate was declared forfeited, if that was made a condition of the breach of it.⁴ In a subsequent case, however, the Chancellor of New York held, that a condition and covenant in a lease in perpetuity, — that, upon every sale of the premises, the lessee or his assigns must obtain the consent, in writing, of the owner of the rent and reversion, and should offer him the

Lovejoy, 8 *id.* 204, the court treat the covenant against underletting as if it were a bar to assigning, but the distinction was not noticed; and notwithstanding the covenant, the assignment in each case was sustained. These cases cannot be regarded as in point. Moreover, in *Greenaway v. Adams*, the words were not to "*set, let, or demise*." The Court say, p. 400, "It would be strange if a lessor should restrain a partial and not total alienation." This is a mere *dictum*; and it would be sufficient reason for such restriction, that a lessor has no recourse against an under-tenant, but on an assignment has his remedy against the assignee and lessee at the same time. But the decision was correct on the words employed; and is so viewed, 2 *Platt, Leases*, 259; 1 *Smith, Lead. Ca.* 91.

There seems, therefore, no good authority against the proposition in the text. A covenant not to underlet in which covenantor's assigns are not named, does not bind an assignee. 4 *Kent, Com.* 180; *Dumpor's case*, 4 *Co.* 119; 2 *Cruise, Dig.* 7.

¹ *Roe v. Harrison*, 2 *T. R.* 425; *Roe v. Sales*, 1 *Maule & S.* 297.

² *Greenaway v. Adams*, 12 *Ves.* 895. The word *set*, in this case, was construed to mean an assignment or conveyance of the whole term; on the supposition that the other words of the covenant could not have a distinct operation and effect without reference to an assignment. *Crusoe v. Bugby*, 8 *Wils.* 234.

³ *Doe v. Worsley*, 1 *Campb.* 20.

⁴ *Jackson v. Schutz*, 18 *Johns.* 174; *Jackson v. Groat*, 7 *Cow.* 285.

right of pre-emption, and, if sold after such offer, one-tenth of the purchase-money to be paid to the lessor, — was in restraint of and in the nature of a fine upon alienation, and inconsistent with the spirit of our institutions; that the remedy, if any, was at law, and not in equity; and that if the landlord has not secured to himself a remedy at law, a court of equity will not interfere to help him.¹ But the Court of Appeals in this State have finally determined that all such restraints upon alienation are absolutely void, as repugnant to the estate granted.²

§ 405. Where a lease provided that the landlord should re-enter, in case the tenant should let the premises, or any part thereof, or convey to any person whatsoever, for all or any part of the term, without the license of the lessor; and the tenant, without such license, took a third person into copartnership with him, and agreed to let him the back chamber and some other part of the premises exclusively, and the rest jointly with the lessee, and he was accordingly let into possession; the court held this to be a breach of the proviso, whether the possession was given gratuitously or for rent.³ But a covenant not to underlet without the consent of the lessor, does not apply to a mere change in the business of the lessee's firm, incident to the admission of a new partner or the withdrawal of an old one.⁴ Nor is it broken by taking in a lodger, although he have the exclusive possession of a room for a year or more; for, as Lord Ellenborough said, "the covenant can only extend to such underletting, as a license might be ex-

¹ *Livingston v. Stickles*, 8 Paige, 398.

² *De Peyster v. Michael*, 6 N. Y. 487; *Oberbach v. Patrie*, *ib.* 510. By the common law, restraints upon the alienation of land could only be imposed by persons having a reversion, or at least a possibility of reversion, therein. And when the Act of October 22d, 1779 (1 Jones & V. 44), transferred the seigniorship of land from the king to the people of this State; and the Act of February 20th, 1787 (1 R. L. 70), put an end to all feudal tenures between one citizen and another, and substituted in their place a tenure between each landholder and the people in their sovereign capacity, — the entire foundation on which the right of the grantor to restrain alienation formerly rested, was removed. A right of re-entry for non-payment of rent, or non-performance of any other condition, is not a reversion, or a possibility of a reversion; it is not an estate in land, but a right of action, and, if enforced, the person

entering would be in by a forfeiture of condition, and not by reverter. And, therefore, the court conclude that where lands are leased in fee, whatever conditions the lease may contain, the lessor has no reversion, or possibility of reversion, and cannot impose restraints upon the power of alienation by the lessee. Per Ruggles, J. But conditions and covenants for the payment of rent in these demises are enforceable notwithstanding the want of a reversion. See *ante*, § 261, and notes.

³ *Roe v. Sales*, 1 Maule & S. 297. If the vendor of a lease, containing a covenant not to assign contracts to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license. *Lloyd v. Cripe*, 5 Taunt. 249; *Austin v. Harris*, 10 Gray, 296. He is bound, also, to show that he has obtained the lessor's consent. *Mason v. Corder*, 7 Taunt. 9.

⁴ *Roosevelt v. Hopkins*, 38 N. Y. 81; *Hargrave v. King*, 5 Ired. Eq. 430.

pected to be applied for, and who ever heard of a license from a landlord to take in a lodger?"¹

§ 406. *Depositing a lease, as security* for money, is no breach of a covenant not to assign;² even though the covenant be not to let, set, assign, transfer, or *otherwise part with* the premises thereby assigned, or that present indenture of lease.³ Nor can the mere act of advertising the leased premises for sale be construed into a breach of such covenant.⁴ If a lessee covenant that he, his executors, or administrators, will not assign without license, and dies, the executor will be bound by the covenant, and cannot sell the premises for the payment of debts, without the license of the lessor.⁵ And a covenant that the lessee may assign or sell the demised premises, on giving the pre-emption to the lessor, and paying one-tenth of the purchase-money to him, or that the lease shall be forfeited, extends not only to an assignment of the lessee, but to that of his assignee, either by a voluntary assignment, or by operation of law.⁶

§ 407. If the covenant prohibits an *assignment to some particular person*, it is to be understood of an immediate assignment to that person; for if the assignment is made to some third person, who subsequently assigns to the prohibited individual, there is no breach of the covenant;⁷ unless the assignment had been made to such third person with the intent, and for the purpose of his assigning it over.⁸ But if it be covenanted, "that in case the lessee should suffer or permit more than one person to every hundred acres, to reside on, use, or occupy any part of the premises, the lease should be void," and the lessee lets part of the premises to persons for a year, to cultivate on shares, in the proportion of more than one to each hundred acres, it is a breach of the condition, and defeats the lease.⁹ And if the lease contains a covenant that the lessee shall not assign without the permission of the lessor, an assignment of part of the premises with such consent is not a surren-

¹ Doe v. Laming, Ry. & M. 36. This was doubted in Greenslade v. Tapscott, 1 Cr. M. & R. 59; and an exclusive right to occupy, was held to be a breach of covenant not to underlet.

² Doe v. Bevan, 3 Maule & S. 353.

³ Doe v. Hogg, 4 D. & R. 226.

⁴ Gourlay v. Duke of Somerset, 1 Ves. & B. 73.

⁵ Lloyd v. Crispe, 5 Taunt. 249; Roe v. Harrison, 2 T. R. 425. So Wollaston v. Hakewell, 8 Scott, N. R. 593; Paul v. Simpson, 9 Q. B. 365; Seers v. Hind, 1 Ves. 294. But a covenant for one and his

executors does not bind assigns. Doe v. Smith, 5 Taunt. 795; Bally v. Wells, 8 Wils. 38; Paul v. Nurse, 8 B. & C. 486. A covenant by lessee and assigns not to assign, in a lease to lessee and assigns, was formerly held void. But this seems no longer law. Weatherall v. Geering, 12 Ves. 511.

⁶ Jackson v. Groat, 7 Cow. 285; Jackson v. Schutz, 18 Johns. 174.

⁷ Dyer, 45, a.

⁸ Co. Lit. 223, b.

⁹ Jackson v. Brownell, 1 Johns. 287; Same v. Rich, 7 id. 194.

der, but the lessee still remains liable for every act of the assignee, that amounts to a breach of the covenant.¹

§ 408. But an assignment, either by the lessee or his executor, which is not voluntary, but done *by operation of law*, is not a breach of the covenant not to assign.² Therefore, where a lessee, who had so covenanted, gave a warrant of attorney to confess a judgment on which the lease was taken in execution and sold, it was considered no breach of the covenant.³ But such execution must be *bonâ fide*, for if the tenant give a warrant of attorney to a creditor for the express purpose of enabling the creditor to take the lease in execution, this will be a fraud and a breach of the covenant; and if the lease is sold under such arrangement, the lessor can recover the premises from a purchaser at the sheriff's sale.⁴ And if the lessee makes a general assignment for the benefit of creditors, by order of a court of law, or judge, it will be valid, and his assignees will not be bound by this covenant, but may dispose of it as they please.⁵ It would seem, also, that the devise of a term by the lessee is not a breach of covenant not to assign;⁶ although the earlier cases held to the contrary.⁷ So if a single woman, to whom a lease has been granted with a condition against alienation, take a husband, it is no breach of the condition; because it is the act of the law which gives the lease to her husband.⁸ Yet, if a lease be made to a husband and wife, upon condition that if it come to any other hand than their own, or that of their issue, the lessor shall re-enter; and afterwards the husband die, and the wife takes another husband, the lessor will have a right to re-enter.⁹ And if the covenant is merely personal, as that the lessee shall not sell without leave; his executors, not being named, may sell without incurring a breach.¹⁰

§ 409. The landlord may guard against such an operation of law by the provisions of his contract, by *stipulating that the lease shall not so pass*, and render even an involuntary assignment a forfeiture.¹¹ Thus, where one leased a farm for twenty-one years, if

¹ Jackson v. Brownson, 7 Johns. 227.

² Wilkinson v. Wilkinson, Coop. Eq. 259; Weatherall v. Geering, 12 Ves. 518; Stevenson v. Silvernail, 15 Johns. 278; Jackson v. Corliss, 7 id. 531; Smith v. Putnam, 3 Pick. 221.

³ Philpot v. Hoare, 2 Atk. 219; Doe v. Carter, 8 T. R. 57; Doe v. Bevan, 3 Maule & S. 358.

⁴ Doe v. Carter, *supra*.

⁵ Goring v. Warner, 2 Eq. Ca. Abr.

100; Shee v. Hale, 18 Ves. 404; Doe v. Bevan, *supra*, Doe v. Powell, 5 B. & C. 308.

⁶ Crusoe v. Bugby, 3 Wils. 237; Doe v. Bevan, *supra*.

⁷ Dyer, 45, b; Knight v. Mory, Cro. El. 60; Barry v. Stanton, ib. 330; Dumper v. Syms, ib. 817.

⁸ Moore, 21.

⁹ Com. Dig. (Condition), Q.

¹⁰ 4 Kent, Com. 180.

¹¹ Roe v. Galliers, 2 T. R. 138; Davis

the lessee and his executors should so *long continue to occupy it*, and not to let, assign, or otherwise part with the lease; and the tenant having become bankrupt, and made an assignment, his assignees sold the lease, it was held that the landlord had a right to enter when the insolvent quit the occupation of the premises.¹ And so if the tenant holds his estate under an express condition to keep it in his own possession, or to cease upon its being taken in execution, the estate will cease upon the premises being taken under an execution, so as to put an end to his occupation.²

§ 410. When a license has once been given, the condition is thereby wholly discharged, and no forfeiture is incurred by any subsequent alienation; because a proviso, or condition, cannot be divided or apportioned by the act of the parties.³ Or if the lease be made to three, with a condition, that neither they nor any of them, shall alien without license, and then the lessor licenses one, this discharges the condition as to all.⁴ And whether the license be general, or given to only one person in particular, by name, it does not vary this principle; for the condition being once dispensed with, it is wholly dispensed with; the provision for making void the lease must exist entire, or not at all, and any subsequent assignee may alien without license.⁵ And if the license extends to but part only of the premises, the lessee may afterwards alien the rest without further license.⁶ But this rule of law may be restrained by the express contract of the parties (as is the case with most of the leases granted in the city of New York), that per-

v. Eyton, 7 Bing. 154; *Doe v. Hawke*, 2 East, 481; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 Russ. & M. 864.

¹ *Doe v. Clarke*, 8 East, 185.

² *Doe v. Hawke*, *supra*.

³ See *ante*, § 286, and notes. It is sometimes said that the covenant is discharged. *Jones v. Jones*, 12 Ves. 186; *Doe v. Pritchard*, 5 B. & Ad. 781; per *Patteson, J.* But this seems an error. Where there is a mere condition and no covenant, a license discharges all restriction; but if there is a covenant with a proviso of forfeiture superadded, the latter only is discharged. In *Dumpro's case* there was a bare condition and no covenant. The two cases, *supra*, merely attempted to state that case. Besides, both were *dicta*, and in the former case the covenant was against underletting, not against assigning. All the other cases limit the discharge to the condition. Thus in *Macher v. Foundl. Hosp.*, 1 Ves. & B. 191, *Ld. Eldon* says,

"the condition is gone." In *Brummell v. Macpherson*, 14 Ves. 175, there was a bare condition and no covenant. In *Dakin v. Williams*, 17 Wend. 468, the court say the principle of discharge by license does not apply to covenants, and in *Dickey v. McCulloch*, 2 W. & S. 100, it was held that the condition was discharged, but an action still lay on the covenant, as a contract. The reason of this will appear on referring to the leading case, which went on the insusceptibility of a condition to be apportioned; while a covenant may always be. If therefore there is not a mere condition, but a covenant coupled with a condition, while the lessee and his assignee are relieved of forfeiture, they may still be held liable for breach of the covenant if made in proper terms to run. *Paul v. Nurse*, 8 B. & C. 486.

⁴ *Leeds v. Compton*, 1 Rol. Abr. 472.

⁵ *Brummell v. Macpherson*, 14 Ves. 178.

⁶ *Leeds v. Compton*, *supra*.

mission to assign the lease once given, shall not operate so as to authorize any subsequent assignment, but that for each subsequent assignment, express permission shall be necessary; the object of which appears to be, to require each new party to the assignment, to enter into a fresh covenant with the lessor to pay rent, by which means he gets an additional surety for rent upon every fresh license given.

§ 411. The acceptance of rent by a landlord, after the breach of a condition not to assign, is *tantamount to a license*; ¹ but it seems otherwise with a condition not to underlet, and for any subsequent underletting, the landlord may re-enter.² And in order to put an end to the condition, the license must be such as is therein contemplated.³ Or if the condition be not a general restraint of alienation, but permits the lessee to assign in a particular way, as, for instance, by will, an assignee to whom the lease has been assigned, in the permitted way, cannot assign it in any other.⁴ It was at one time held, that, where there is a right of re-entry upon an assignment or underletting, if a person be found upon the premises acting as a tenant, it is *prima facie* evidence of an underletting; and the defendant must show, whether the person was a tenant or merely a servant.⁵ But Lord Ellenborough subsequently laid down a rule, which has been followed to this day, that it is not sufficient to prove the defendant a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession.⁶

§ 412. As has been already stated a breach of condition producing a forfeiture may be waived whether the lease was expressed to be void or was voidable by re-entry; and the distinction formerly taken that the lease became in the former case void *ipso facto* is no longer law.⁷ And not only the receipt of rent but other acts of waiver will save the forfeiture.⁸ Thus where, in an action of ejectment for the breach of a condition that the lessee should not underlet, in an agreement amounting to a lease, it appeared in evidence, that the lessor of the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price, said, "then

¹ Lloyd v. Crispe, 5 Taunt. 249, 254-7; Smith, Land. & T. 119; *post*, § 501.

² Newman v. Rutter, 8 Watts, 55; Bleecker v. Smith, 13 Wend. 534.

³ See *ante*, § 237, and note.

⁴ Lloyd v. Crispe, 5 Taunt. 249.

⁵ Doe v. Rickaby, 5 Esp. 4.

⁶ Doe v. Payne, 1 Stark. 86.

⁷ See *ante*, § 288; *post*, § 492, and notes.

⁸ Clark v. Jones, 1 Den. 516; O'Keefe v. Kennedy, 3 Cush. 825; Roe v. Harrison, 2 T. R. 425; Mulcarry v. Eyres, Cro. Car. 511; Arnsby v. Woodward, 6 B. & C. 519; Harvie v. Oswell, Cro. Eliz. 572; Goodright v. Davids, Cowp. 808.

let it, and I shall know what it will produce next year;" it was held, that this was a waiver of the forfeiture on a breach of such condition.¹ A lessor, however, who has a right of re-entry on the breach of a covenant not to underlet, does not, by waiving his right on one underletting, lose his right to re-enter on a subsequent underletting.²

§ 413. Where this covenant has been once broken by an assignment, the lessor's right of action for a breach is not affected by his *accepting an assignment of the lease*, from the assignee of the lessee.³ Nor can this covenant run with the land, for the contrary supposes an assignment, which it is the object of the covenant to prevent.⁴ A court of equity will not, in general, relieve against a forfeiture incurred by an alienation without license.⁵ But in order that an assignment shall have the effect of inducing a forfeiture, the instrument must be valid and effectual in point of law; accordingly, where there was a proviso in a lease for re-entry in case of an assignment without license, and the lessee by deed assigned all his property, real and personal, to trustees for the benefit of his creditors, and was afterwards declared a bankrupt; it was held in England, that the deed of assignment being an act of bankruptcy and void, did not operate as a valid conveyance of the lessee's interest under the lease, and did not, therefore, work a forfeiture.⁶

SECTION VI.

THE COVENANT TO RESIDE ON THE PREMISES.

§ 414. The lessee sometimes, also, binds himself and his assigns to *reside upon the premises*: that is, to make them his fixed habitation, the place where his political rights are to be exercised, and where he is liable to taxation. This covenant will be broken not

¹ Doe v. Watt, 8 B. & C. 308.

² Doe v. Bliss, 4 Taunt. 785.

³ Hazlehurst v. Kenrick, 6 S. & R. 446.

⁴ Bally v. Wells, 3 Wils. 38; Doe v. Smith, 5 Taunt. 795. A covenant not to assign without the lessor's written consent is not binding upon the lessee's executors; and they may transfer a lease even against the lessor's will. Barron v.

Duncan's Executors, 6 La. 100. But such a covenant will run if properly framed, as the object may be not to prohibit, but to control, assignments. Smith, Land & T. 119; Paul v. Nurse, 8 B. & C. 486.

⁵ Hill v. Barclay, 18 Ves. 56; Wafer v. Mocato, 9 Mod. 112.

⁶ Doe v. Powell, 5 B. & C. 308.

only by the tenant's abandoning the premises, personally, but by his doing any act whereby his residence may become impossible; as by suffering the premises to be taken and sold under an execution, having first confessed the judgment upon which the execution issued.¹ And a lease on condition that the tenant should actually occupy is determined by his assignees taking possession on his bankruptcy.² This is a covenant running with the land, and will bind an assignee, although the executors and administrators only were named.³

SECTION VII.

THE COVENANT TO BUILD AFTER A PRESCRIBED PATTERN.

§ 415. Although a court of equity will not, in general, decree the specific performance of a covenant, but will usually remit the party to his action of damages for a breach thereof, yet a covenant that the lessee will build a house on the demised premises, to correspond with the adjoining houses already built, as to its elevation or otherwise, is one which will be enforced in that court.⁴ But where a landlord has dispensed with a covenant in favor of one tenant, entered into for the benefit of all, such as to build in uniformity, or of a certain elevation, although the lessor may claim damages at law, he cannot have relief by injunction to restrain others, to whom he has not given such license, from infringing the covenant; for, if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot, with any justice, come into equity for an injunction against those tenants, because they are deprived of the right which he had given them, to have the general plan enforced for the benefit of all.⁵ If land is let to a man, on which he agrees to erect certain buildings, within a certain time, with a power of re-entry to the lessor in case he fail to do so, but no lease to be granted until the buildings are completed; the landlord may re-enter, or maintain ejectment, if the buildings are not erected within the time limited.⁶ And if a lessee agrees to

¹ *Doe v. Hawke*, 2 East, 481; *Tatem v. Chaplin*, 2 H. Bl. 138.

² *Doe v. Clark*, 8 East, 185.

³ *Spencer's case*, 5 Co. 16, a; *Tatem v. Chaplin*, *supra*.

⁴ *Franklyn v. Tuton*, 5 Mod. 469. And see *Mosely v. Virgin*, 8 Ves. 184.

⁵ *Roper v. Williams*, Turn. & R. 18.

⁶ *Oldershaw v. Holt*, 12 Ad. & E. 590; *Doe v. Ekins*, Ry. & M. 29; *Doe v. Birch*, 1 M. & W. 402.

erect a valuable building upon the leased premises, and at the expiration of the term to surrender the premises in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessor at the end of the term.¹

SECTION VIII.

THE COVENANT AGAINST CARRYING ON OFFENSIVE TRADES.

§ 416. *Another covenant*, not infrequently inserted in a lease, on the part of the lessee, is, that he will not *carry on particular trades upon the premises*, nor assign to persons carrying on such trades; or that he will not carry on any business upon the premises offensive to the neighborhood. Sometimes the covenant goes further, and totally prohibits the carrying on of any trade or business whatever. This precaution often becomes necessary, particularly in town leases, not merely for the protection of the premises from injuries which may otherwise be done to them, but likewise to prevent their respectability being lessened, and their good-will thereby diminished. And a court of equity will enforce this covenant, and, by injunction, either regulate or restrain the lessee's occupation of the premises, as circumstances may require.² Covenants of this kind, as they affect the mode of occupation or enjoyment, run with the land; and the assignee, though not named, will be liable to an action for damages, or to forfeiture on the condition of re-entry, if he use the property in contravention of such an agreement.³

¹ The *Mayor v. Hamilton F. I. Co.*, 10 Bosw. 537; Same *v. Brooklyn F. I. Co.*, 41 Barb. 231. If no time is specified in the lease for the erection of the building, tenant may erect at any time during the term; and his declaration that he would not make the improvement at all, is no breach of his agreement. *Palethorp v. Bergner*, 52 Pa. St. 149.

² *Howard v. Ellis*, 4 Sandf. 369. Where the parties by an express stipulation have determined that a particular trade or business, conducted by one, will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which the court can perceive may be highly detrimental to the other,

although it is not clear that it produces a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages; it is the duty of a Court of Equity to restrain further infractions of the covenant. Per Sandford, V. C., in *Steward v. Winters*, 4 Sandf. Ch. 537; *Dodge v. Lambert*, 2 Bosw. 570.

³ *Mayor, &c. v. Pattison*, 10 East, 136; *Brouwer v. Jones*, 23 Barb. 153. A recital in a lease, of the purposes for which demised premises are let, for example, describing them as now occupied as a timber yard, and to be occupied as a timber yard, constitutes an express covenant on the part of the tenant to use them for no other

§ 417. *The general doctrine*, with regard to covenants in restraint of trade, is, that all contracts which go to a total restraint of trade, as that a man will not pursue his occupation, or carry on business anywhere in the State, are contrary to sound policy, and void, upon whatever consideration they may be made. Such contracts must be injurious to the public, and no good reason can be shown why one individual should thus fetter himself, or another should contract for the restraint; they are injurious to one party, without being beneficial to the other. But there may be good reasons for allowing parties to contract for a limited restraint, and such contracts, if made on a sufficient and reasonable consideration, are valid; yet, even then, the law presumes them to be bad, until the circumstances inducing the arrangement are shown to the court to be reasonable and useful.¹ This rule applies, with great propriety, in favor of a landlord whose premises may be injured, and his general interests suffer by the carrying on of many trades and operations upon them. And, for this reason, a contract not to exercise a trade, or carry on business in a particular place, or with a particular person, will be upheld and enforced. As if a lessee covenants that he will not let the shop, yard, or other thing belonging to the house, to any one who shall sell coals, and will not himself sell coals there; and then let the whole house to one who sells coals, there is a breach of the covenant.² And where a lessee covenanted not to use, or exercise, or suffer, or permit another to use, or exercise any trade or business whatever, upon the premises, and then assigned his lease to a schoolmaster, who carried on his business on the premises, the schoolmaster's business was held to be a breach of the covenant.³

§ 418. But no covenant in a lease in restraint of a beneficial use of the property will be implied in any case where none is expressed. Thus a covenant, not to use the premises for any other purpose,

purpose. *De Forest v. Byrne*, 1 Hilt. 48. And is a covenant running with the land, binding on the assignee. *Ib.*

¹ *Chappel v. Brockway*, 21 Wend. 157; *Ross v. Sadgbeer*, *ib.* 166; *Pierce v. Fuller*, 8 Mass. 228; *Nobles v. Bates*, 7 Cow. 307; *Horner v. Graves*, 7 Bing. 735; *Palmer v. Stebbins*, 8 Pick. 188; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Archer v. Marsh*, 6 Ad. & E. 959; *Pike v. Thomas*, 4 Bibb, 486. The inquiries to be made to determine the validity of a contract in restraint of trade, are: 1. Whether it is a partial restraint. 2. Is it upon an adequate con-

sideration? 3. Is it reasonable? *Holbrook v. Waters*, 9 How. Pr. 335.

² *Chinsley v. Langley*, 1 Rol. Abr. 427, l. 85; *Doe v. Bird*, 2 Ad. & E. 161.

³ *Doe v. Keeling*, 1 Maule & S. 95; *Doe v. Spry*, 1 B. & A. 617. So of a covenant by the lessor of a brewery that he will not, during the continuance of the demise, carry on the business of a brewer or merchant or agent for the sale of ale, in S., or elsewhere, or in any other manner howsoever, be concerned in said business. *Hinde v. Gray*, 1 M. & G. 195.

will not be inferred from the words "to be used as cabinet ware-rooms."¹ And in a case where the lessee covenanted that he would not do any act upon the premises which might be to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to the neighborhood, and that he would not permit any person to inhabit the premises who should carry on certain specified trades or business (that of a licensed victualler not being one of them), or any other business that might be offensive, or an annoyance, or disturbance to any of the lessor's tenants; the court held, that the opening of a public-house on the premises was no breach, as it did not appear that such public-house was an annoyance to the tenants, or likely to become so.² So a covenant not to carry on the business of a common brewer, or retailer of beer, is not broken by carrying on the business of a retail brewer.³ But a covenant not to carry on the trade of a butcher is broken by selling raw meat, although no animals are slaughtered on the premises.⁴ And a covenant to occupy as a jobber is broken by occupying as an auctioneer.⁵ Where several adjoining lots in the city of New York were sold to different individuals by the same proprietor, and the deeds contained a covenant against the erection of any livery-stable, slaughter-house, glue-factory, or any other manufactory, trade, or business, which might be any way offensive to the neighboring inhabitants; the Court of Chancery held, that such covenant was for the mutual benefit and protection of all the purchasers; and although a previous purchaser from the original proprietor could not sue thereon at law, yet that a court of equity might protect him, by injunction, against the carrying-on of any noxious business or trade upon the lot of such subsequent purchaser; and that the business of a coal-yard upon any of the lots is a business offensive to the neighboring inhabitants, within the spirit and intent of the restrictive covenant.⁶

¹ *Brugman v. Noyes*, 6 Wisc. 1.

² *Jones v. Thorne*, 1 B. & C. 715.

³ *Simons v. Farren*, 1 Bing. N. C. 126.

⁴ *Doe v. Spry*, 1 B. & A. 617. In construing a covenant not to carry on an offensive business, much will depend on the situation of the premises, and its relation to other buildings. *Gutteridge v. Munyard*, 7 C. & P. 129; *Seymour v. McDonald*, 4 Sandf. Ch. 502. Using a house as a private lunatic asylum was held to be *per se* no breach. *Doe v. Bird*, 2 Ad. & E. 161.

⁵ *Steward v. Winters*, 4 Sandf. Ch.

587. It is no defence to an action to restrain the lessees from using the premises in a way which they covenanted not to do, that the use is not a public or a private nuisance; nor that it will not deteriorate the premises in value; nor that the lessees have expended large sums, with a view to such prohibited use, which they will lose if not permitted to violate their covenant. *Dodge v. Lambert*, 2 Bosw. 570; *Howard v. Ellis*, 4 Sandf. 389.

⁶ *Barrow v. Richard*, 8 Paige, 351. As to keeping a lunatic asylum, see *Doe v. Bird*, 6 C. & P. 201; s. c. 2 Ad. & E. 161.

§ 419. If a tenant covenant not to carry on a particular trade without the written consent of the lessor, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on another, without a written license.¹ Where the engagement is not to trade within a given distance in a town, such distance is to be measured by the shortest way of access by the foot-path. Thus, where the assignor of the lease of a public-house in London covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned, it was held that the half mile, as mentioned in the covenant, imported half a mile measured, not in a direct line, but by the nearest way of access between the premises assigned and any public-house afterwards kept by the assignor.² If a lessee exercise a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, as some positive act of waiver is necessary; but if he permit the tenant to expend money in improvements, to adapt them to the trade, it would seem to be evidence to be left to the jury of his consent to their being so occupied.³

SECTION IX.

THE COVENANT FOR PARTICULAR MODES OF CULTIVATION.

§ 420. In leases of farms, there are usually *covenants as to the manner in which the farm is to be managed*; the course of cropping, the expenditure upon the farm of the manure made upon it, and

And as to preventing a nuisance by injunction, see, *ante*, § 208, note. An injunction will not be granted to restrain a breach of covenant, not to carry on a certain business, under penalty of liquidated damages, although the defendant was insolvent; for plaintiff has a legal remedy. *Vincent v. King*, 18 How. Pr. R. 234.

¹ *Macher v. The Foundling Hospital*, 1 Ves. & B. 188.

² *Leigh v. Hind*, 9 B. & C. 774. In a lease of a coal mine, the lessee stipulated that he would pay rent for coal taken out, and also mine a certain number of tons annually; and it was held that settlements for coal taken out, were not as matter of

law, a discharge of a breach in not taking out the stipulated quantity. *Powell v. Burroughs*, 64 Pa. St. 329.

³ *Doe v. Allen*, 3 Taunt. 71. Sometimes the prohibition is against turning the premises into an inn, or a boarding-house; and the difference between them seems only to be, that, in a boarding-house, the guest is under an express contract, at a certain rate, and for a certain period of time; but in an inn there is no express engagement, the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract. *Willard v. Reinhardt*, 2 E. D. Smith, 148.

the like. These, of course, differ in different sections of the country, according to the course of husbandry adopted in them. Sometimes they are intended to enforce the custom of the country, in reference to what may be considered good husbandry; at other times, to vary from it; and, in this latter case, the covenant will, of course, exclude and supersede the custom. And, therefore, where a tenant held the premises under the terms of an expired lease, by which it was stipulated that the tenant, on quitting the farm, should not sell or take away any of the manure in the fold, but should leave it to be expended by the landlord, or his succeeding tenant, and the lease contained no stipulation as to the tenant being entitled to payment for such manure, but, by the custom of the country, although the tenant would be bound to leave the manure in like manner, yet he would be entitled to payment for it; it was held that, as an express stipulation had been made upon the subject, the custom was thereby excluded, and that the tenant was not entitled to be paid for the manure.¹ But as far as the custom is not inconsistent with the express stipulations of the lease, it is deemed to be impliedly grafted upon it, and to form part of the contract between the parties.²

§ 421. Independent, however, of express covenants for proper cultivation, on the part of a tenant, it is held, that the mere relation of landlord and tenant is a sufficient consideration to raise an implied promise, by the tenant, to manage the farm in a husband-like manner, and in conformity to the custom of the neighborhood.³ And even where a tenant occupies under an agreement, which does not amount to a lease, he is liable, upon the same principle, to an action for mismanaging the farm.⁴ But this obligation extends only to a reasonable and usual cultivation, and does not bind the tenant to any extraordinary course of cultivation.⁵

§ 422. The common covenants in husbandry are not generally the subject of an equitable jurisdiction, for which a specific performance can be granted.⁶ But an injunction has been granted to restrain a tenant from year to year, who, it was said, was equally bound as a tenant for a longer period, to manage his farm in a

¹ *Roberts v. Barker*, 1 Cr. & M. 808.

² *Hutton v. Warren*, 1 M. & W. 466; *Hindle v. Pollett*, 6 id. 529.

³ *Powley v. Walker*, 5 T. R. 373; *Horsefall v. Mather*, Holt, 7; *Buck v. Pike*, 27 Vt. 529.

⁴ *Tempest v. Rawling*, 13 East, 18. On this subject, see *The Tenant's Covenant to repair*, ante, § 844.

⁵ *Legh v. Hewitt*, 4 East, 154; *Webb v. Plummer*, 2 B. & A. 746.

⁶ *Rayner v. Stone*, 2 Eden. 128.

husband-like manner, from removing crops, manure, &c., except according to the custom of the country.¹ In another case, where a tenant was enjoined from ploughing up pasture-land, the lease contained no express covenant not to convert pasture into arable land; but the landlord was, nevertheless, held to be entitled to the injunction, on the ground of there being an implied covenant to manage pasture in a husband-like manner.² Upon the same principle, the court has interfered to restrain a tenant from sowing mustard, saffron, or other deleterious crops, as being contrary to the usual course of husbandry.³

§ 423. If a tenant covenants to leave stock of a certain amount upon the premises, and a fair ground of suspicion should arise that he does not mean to perform his covenant in that respect although compensation in damages might be had for a breach, yet the agreement having relation to the sort of enjoyment for which the landlord has stipulated, after the expiration of the term, a bill in the nature of a *quia timet* may be filed.⁴ And where a man was let into possession of a farm, and paid rent, under an agreement for a future lease for fourteen years, which was to contain a covenant (amongst others) against taking successive crops of corn from the land, and a proviso for re-entry for breach of any of the covenants, but the lease was not in fact executed; the tenant having taken successive crops of corn from the farm, which would be a breach of the covenant if the lease had been executed, the lessor brought an ejectment, and was allowed to recover. For, until the lease should be executed, the tenant, it was said, held as a yearly tenant, subject to the terms and conditions which, by the agreement, were to be embodied in the lease; and, being guilty of a breach of one of them, the landlord had a right to re-enter.⁵

¹ Onslow v. —, 16 Ves. 178.

² Drury v. Molins, 6 Ves. 328.

³ Pratt v. Brett, 2 Mod. 62.

⁴ Ward v. Buckingham, cited 10 Ves. 161; s. c. 8 Bro. P. C. 581; Briggs v. Oaks, 28 Vt. 138; Smith v. Niles, 20 id. 815.

⁵ Doe v. Amey, 12 Ad. & E. 476. A lessee for years covenanted not to carry off hay from a farm, and a quantity of hay

was attached by his creditors, and carried off by his consent, held to be no breach of his covenant. Smith v. Putnam, 8 Pick. 221. But the lessor may, under these circumstances, have an action against the attaching creditor of the tenant, or one who purchases with notice of the landlord's right. Leland v. Sprague, 28 Vt. 746. Baxter v. Bush, 29 id. 465.

SECTION X.

THE COVENANT TO REDELIVER FIXTURES, ETC.

§ 424. Where fixtures, which are not part of the freehold, furniture, or other goods or chattels, are leased together with houses, it is usual to attach a schedule of them to the lease, and to insert a covenant by the lessee to redeliver them in good condition at the end of the term. The object of this is to give the lessor a remedy on the covenant at the end of the term, for their non-delivery as well as for any damage sustained by their being injured; for, as he cannot complain of any injury during the existence of the term, because they may be replaced before the end of it, and as the ordinary remedy by an action of trover or replevin merely affects the recovery of the chattels, he would be without remedy for damage done to them without the insertion of such a covenant.¹ The covenant sometimes includes a surrender of all the improvements that a lessee may put upon the premises; and will then embrace every addition, alteration, erection, or annexation made by the lessee during the demised term, to render the premises more available and profitable, or useful and convenient.²

¹ A lessee, when sued for breach of his agreement to surrender to the lessor, at the end of the term, chattels annexed to the premises, but not fixtures, may defend by showing that they belonged to another person, and were taken from defendant's possession by virtue of a chattel mortgage

executed by the owner. *Lawrence v. Kemp*, 1 Duer, 368; *Higgins v. Whitney*, 24 Wend. 379; *Perry v. Chandler*, 2 Cush. 237; *Kaley v. Shed*, 10 Metc. 817.

² *French v. The Mayor*, 16 How. Pr. R. 220.

CHAPTER X.

OF THE TRANSFER OF A LEASE, AND ITS CONSEQUENCES.

§ 425. THE rights and liabilities of the respective parties to a demise, which we have been considering, are not confined to the immediate parties to the lease, but will be found to attach to all persons, to whom the estate may be transferred, or who shall succeed to the possession of the premises, either as landlords or tenants. This principle follows as a necessary consequence of that privity of estate which is incident to the relation of landlord and tenant. Let us first observe the different modes of assignment; and next, the various rights and liabilities connected therewith.

SECTION I.

OF ASSIGNMENTS IN FACT AND IN LAW.

§ 426. An assignment of a lease is the transfer of a tenant's whole estate therein, to some third person; and such a transfer may be made by either of the parties to the lease if not restricted by some stipulation therein. A general grant of the reversion passes all the leases to which the property is subject, including the rents reserved, as incident to the grant. But the lessor may assign the rent to become due upon a lease, without assigning the reversion; or he may grant the reversion, and, by special words, reserve the rent.¹ An assignment *differs from a lease* in this, that by the latter the lessor grants an interest less than his own, reserving to himself a reversion; but by an assignment, he parts with the whole of his interest in the property. An assignment may not only reserve rent to the assignor, but the deed may contain covenants which were not in the original lease to him; and it may

¹ Willard v. Tillman, 2 Hill, 274; Dixon v. Niccolls, 39 Ill. 372; Watson v. Hunkins, 13 Iowa, 547; Patten v. Deshon, 1 Gray, 325; Ryerson v. Quackenbush, 2 Dutch, 236; Childs v. Clark, 3 Barb. Ch. 52; Leonard v. Burgess, 16 Wisc. 41.

even purport to convey a larger interest than the assignor himself possessed.¹ If the grantor conveys a shorter term, or a less estate than he himself had in the premises; or if a lessee for life grants a term of ninety-nine years, provided the life should so long continue, this is not an assignment of the freehold, but only a grant of a term; and will, in neither case, amount to any thing more than an under-lease.² So where the assignee of a lessee demised the premises for the residue of the term, reserving the delivery of possession at the end thereof, and the intermediate possession in case the buildings were destroyed by fire, the demise was held to be an under-lease, and not an assignment of the term.³

§ 427. An assignment is either *in fact*, by the voluntary act of the parties, or by *operation of law*. An assignment in law occurs wherever, without a voluntary conveyance, the estate is, upon some particular event, transferred by the mere operation of law; as by marriage, where the husband acquires a right to his wife's leasehold property and other effects; or by the sale of a lease under an execution issued against the lessee, when the purchaser becomes the assignee in law of the sheriff. So where a man dies possessed of a term of years, the law vests it in his personal representatives, unless he has disposed of it by will. As to an assignment in fact, we observe that a mere *verbal* assignment of a lease for years is void under the statute of frauds, which declares, that no estate or interest in lands, other than leases for a term not exceeding one year, shall be granted, *assigned*, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party granting or *assigning* the same, or by his lawful agent, thereunto authorized by writing.⁴ Although an express assignment of a term of years can only exist by deed or writing, it is not necessary that such writing be under seal, even if the lease to be transferred is a sealed instrument.⁵ But an assignment made by the assignor, in blank, and affixing his seal on the back of the lease, to be afterwards filled up by a third person,

¹ *Palmer v. Edwards*, 1 Doug. 187, n.; *Pluck v. Digges*, 5 Bligh, n. s. 81; *Baker v. Gostling*, 4 Moore & S. 589.

² *Derby v. Taylor*, 1 East, 502.

³ *Post v. Kearney*, 2 N. Y. 394. In what instances and to what extent a sub-lease may be created, notwithstanding the whole term is parted with, has been fully examined, *ante*, § 16, and notes.

⁴ 2 N. Y. R. S. 184, § 6; and see *Bolting v. Martin*, 1 Camp. 318.

⁵ *Hess v. Fox*, 10 Wend 486; *Holliday v. Marshall*, 7 Johns. 211; *Beck v. Phillips*, 5 Burr. 2827; *Botting v. Martin*, 1 Camp. 318. An assignment of a lease under seal must also be under seal, in order to constitute the relation of lessor and lessee between the new parties. *Brewer v. Dyer*, 7 Cush. 387; *Wood v. Partridge*, 11 Mass. 488; *Bridgham v. Tileston*, 5 Allen, 371.

which is done accordingly, is neither a deed nor a note in writing within the statute.¹ Upon every assignment of a lease, a revenue stamp is required to be affixed, of an equal amount to that which is imposed upon the original instrument; increased by a stamp duty on the consideration or value of the assignment equal to that which is imposed upon the conveyance of land, for similar consideration or value.²

§ 428. An assignment is usually made by the words *grant, assign, and set over*, but no particular expressions are necessary for the purpose, provided the intention of the parties sufficiently appears. No consideration need be expressed in it, for the liability of the assignee to pay the rent reserved by the lease is itself a sufficient consideration.³ An order drawn by a landlord on his tenant, to pay accruing rent to a third person, operates as an assignment of such rent; and the tenant is bound to pay to such person, whether he has accepted the order or not, and notwithstanding a subsequent notice from the landlord not to pay.⁴ In some cases, also, a transfer will be implied, although an actual delivery of the instrument has not taken place; as where a lease was sold at auction, and the purchaser paid the deposit-money, and the vendor's solicitor prepared the assignment, but would not deliver it until his fees were paid, Lord Ellenborough held that the assignment was complete, although the deed had never been delivered to, or accepted by, the purchaser.⁵ But the transfer of a mere equitable interest will not make a man an assignee; as the delivery and deposit of a lease as security for money, without any written assignment: for, though it may create a right in equity, it passes no interest at law.⁶

¹ Jackson v. Titus, 2 Johns. 480.

² An act to provide internal revenue, &c., passed June 30, 1864, sec. 158. *Ante*, § 170.

³ Noy's Max. 92; Barker v. Keate, 1 Mod. 263; s. c. 2 *id.* 252. It is unnecessary to inquire whether an assignment passes the legal title, in order to determine whether the assignee may sue in his own name; for whether his title be legal or equitable, he may maintain an action, if he has the whole interest. Hastings v. McKinley, 1 E. D. Smith, 273.

⁴ Bradley v. Root, 5 Paige, 682; Weston v. Barker, 12 Johns. 279. At law, as well as in equity, an order for value is, *per se*, an equitable assignment to the payee of the fund on which the order is drawn. Morton v. Naylor, 1 Hill, 588.

⁵ Odell v. Wake, 8 Camp. 894.

⁶ Doe v. Roe, 5 Esp. 105. To vest title in an assignee, there must be an unconditional delivery of the assignment, where it is delivered to a third person, to be delivered to the assignee on payment of the purchase-money: no title passes by a delivery without payment. Peabody v. Fenton, 8 Barb. Ch. 451. But in an action for rent against one alleged to be an assignee, the question is not, whether the defendant is assignee by a valid instrument as between him and the lessee, but whether he has held himself forth as such. Indirect proof is sufficient to establish the relation of assignee, and to show its termination, and that a new occupant was received as assignee. Carter v. Hammett, 12 Barb. 258; s. c. 18 *id.* 606; Armstrong v. Wheeler, 9 Cow. 88.

§ 429. *To constitute an assignee* of the lease, it must appear that he claims through, and is in, of the same estate as the person whom he succeeds, for if he comes in by an elder title, he is not an assignee.¹ But the fact of demised premises being found in the possession of one not named in the lease, raises a presumption that he is in as assignee of the lessee, and not as under-tenant; especially if it appear that he has paid rent to the original landlord.² In a case of debt for rent, stating a demise of a messuage, by the plaintiff to W. H. for one year, and so on from year to year, if they should respectively please, at the yearly rent of £140, payable quarterly, and an assignment by W. H. to the defendant; the plaintiff proved an agreement (signed by himself only), for a lease of the premises by him to W. H. for seven years, at £140 a year; that no lease had been actually executed, but that W. H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of £140 a year; it was held, that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which W. H. had an assignable interest, so as to charge the defendant as his assignee.³

§ 430. We have seen, that every estate or interest in lands is transferable, though the interest be future. Thus a term of years, to commence *in futuro*, may be assigned, for the interest is vested *in presenti*, though it does not take effect till a future time.⁴ Even a possibility of a term is assignable in equity for a good consideration, but not so in law; and though a contingent interest which a husband has in right of his wife, or the possibility of a term, is not strictly good by way of assignment, yet either will operate as a valid agreement, when for a valuable consideration: but it must be an assignment of that particular thing, and not rest only in intention and the construction of words in a covenant.⁵ A power coupled with an interest is assignable, though a bare power is not; therefore, if a lease be made with an *exception of the trees*, and a power be reserved to the lessor to enter and cut them down, he

¹ *Chaworth v. Phillips*, Moore, 876; *Roach v. Wadham*, 6 East, 289; *Jeberwood v. Oldknow*, 8 Maule & S. 382; *Whitfield v. Howe*, 2 Show. 57.

² *Acker v. Witherell*, 4 Hill, 112. So *Bedford v. Terhune*, 30 N. Y. 453; *Shee v. Gray*, 15 Ir. Com. L. 296; but this presumption may be rebutted. *Ib.* But where a lessee takes in a co-occupant, no such

presumption arises. *Austin v. Thomson*, 45 N. H. 118.

³ *Braythwaite v. Hitchcock*, 10 M. & W. 494.

⁴ Com. Dig. tit. Assignment; *ante*, §§ 15, 73.

⁵ *Theobalds v. Duffoy*, 9 Mod. 102; *Chandos v. Talbot*, 2 P. Wms. 608.

may assign this power to another person ; but if it be not strictly pursued, the lessee may maintain trespass both against the lessor and his assignee. And if, in a lease for years, of lands *excepting the woods*, the lessor grants the trees to the lessee, and assigns the lands over to another, the trees do not pass by this assignment to the assignee.¹

§ 431. Any covenants may be introduced in an assignment, but the proper covenants, on the part of an assignor, are, that the indenture of lease is good in law: that he has power to assign ; to save the assignee harmless from former grants and encumbrances, and for quiet enjoyment. On the part of the assignee, they are, that he will pay rent, and perform the services and covenants mentioned in the lease, or save the assignor harmless therefrom.

§ 432. *Marriage*, was at common-law an assignment in law to the husband of the wife's chattels real ; and all her terms for years thereby became absolutely vested in him ; so that he might sell, mortgage, or otherwise dispose of them without her concurrence. They were liable, also, to be taken in execution to satisfy his debts.² If he disposed of the wife's term, reserving rent, the rent after his death belonged to his executor, and not to the wife.³ But if he made no disposition of them during his lifetime, he could not devise them by his will ; for the wife, after his death, took the same in her own right, without administering upon her husband's estate. Yet, if he survived his wife, he took them all by survivorship.⁴ But, although a husband might assign or mortgage his wife's chattels real, free from her contingent right of survivorship, it must have been upon a *valuable* consideration ; for, if it were a mere *voluntary* assignment, it would not bind her if she survived him.⁵ We have, however, in a former part of our work seen a variety of statutory modifications of these common-law principles.⁶

§ 433. A *devisee* is also an assignee in law, and, as such, liable to an action upon all covenants in the lease that concern the land,

¹ Warren v. Arthur, 2 Mod. 317 ; Greene & Harris' case, Godb. 128. A grantee of a reversion of leasehold premises, who takes an assignment of the lease after the rents have been assigned to another person, may be held liable as assignee of the lessee, to the assignee of the rent. Childs v. Clark, 8 Barb. Ch. 52.

² Co. Lit. 46, b ; 851, a. The law is otherwise in the State of New York, where her separate property is secured to her by statute.

³ Bac. Abr. Baron & Feme (C), 2.

⁴ Co. Lit. 851, b.

⁵ Schuyler v. Hoyle, 5 Johns. Ch. 196.

⁶ *Ante*, §§ 101-107.

such as to pay rent and repair ;¹ and, in general, he may maintain all such actions as the assignee of a lease ordinarily may, and which have already been mentioned.² A lease being an interest in lands which a man may dispose of by his will, such disposition, of course, takes effect upon the death of the proprietor, vesting, in the first instance, in the executor, by virtue of his office ; and the legatee cannot enter without the consent of the executor ; but, if he dies without making such will, his leasehold property will go to his administrator by operation of law. At common law, if a person died seised of any species of rent in arrear, neither the heir or executor could maintain an action of debt for such rent ; the heir, because he was a stranger to the personal contracts of his ancestor, and the executor, because he did not represent his testator as to any contract relating to the freehold and inheritance. To obviate this inconvenience, it was enacted by statute 32 Hen. VIII. ch. 37, that an executor or administrator of any person seised of such rents, might maintain debt against the person who ought to pay the same, and his personal representatives. The Revised Statutes of New York, in like manner provide,³ that the executors and administrators of every person to whom any rent shall have been due and unpaid at the time of his death may have the same remedy by action or by distress, for the recovery of all such arrears, that their testator or intestate might have had, if living.

§ 434. An *executor* or *administrator* takes as assignee, by virtue of his office, all leases for years of land, rents, or the like ; corn growing or cut, trees and grass cut and severed, together with all arrearages of rent that are due to the lessor at the time of his death. So that if a lease be made to a man for twenty years, without naming his executor, administrator, or assigns, the executor or administrator will, notwithstanding, have it during the remainder of the term.⁴ In the case of a tenancy from year to year, or as long as both parties please, if the tenant die without making a will, his administrator has the same interest in the land which the deceased had ; for whatever chattel interest the intestate had during his lifetime must vest in his administrator, as his legal representative.⁵ But an executor or administrator cannot have the trees and grass growing on the ground, any more than

¹ *Holford v. Hatch*, Doug. 183.

² *Com. Dig. tit. Covenant* (B. 8).

³ *N. Y. R. S.* 747, § 21.

⁴ *Shep. Touch.* 468 ; *Nimmo v. Com-*

monwealth, 4 Hen. & M. 57 ; *Gutzweiler's adm'r v. Lackmann*, 39 Mo. 91.

⁵ *Doe v. Porter*, 8 T. R. 13 ; *James v.*

Dean, 11 Ves. 393.

the soil or ground on which they grow; for these belong to the heir. If a lease of land be made for life or years, whereon a house is standing, or timber growing, and the house is prostrated, or the timber cut or fallen down, no matter by what means, the materials of the house and the timber are now become a chattel; and, therefore, if the lease be *without impeachment of waste*, it will go to the lessee, and, after his death, to his executor or administrator; but if the lease be otherwise, it goes to the lessor, and, after his death, to his executor or administrator. But if the timber be cut for repairs only, or if the lessee will employ the materials of the house to build it again, and the lease continues, it may be so employed, and then the executor or administrator of the lessor may not take it.¹

§ 435. We observe also that the sale of a term of years, by a sheriff under an execution, takes effect as an assignment in law. If a lease is *taken in execution* against the landlord, the sheriff cannot turn a tenant out of possession;² but it seems he may put a vendee in possession, when he sells a term in possession of the debtor.³ Upon such sale, he must execute an assignment of the lease, in writing, to the purchaser; and if he merely puts the execution creditor in possession, the debtor may recover it again in ejectment.⁴ Such assignment will be valid, if made at any time subsequent to the return of the execution, provided the sale took place before the writ was returnable.⁵ When a sheriff takes a lease and fixtures in execution, he must sell the fixtures separately if he cannot find a purchaser for the whole.⁶ In making the assignment to the purchaser, he need not state the particular interest which the defendant has, for he may not be able to ascertain precisely what it is; it will be sufficient to state that the defendant is possessed of a term of years yet to come and unexpired, and to assign all his interest therein generally. And, in fact, this is the more prudent way of stating the defendant's interest; for if the sheriff should fail in his particular statement, the purchaser will not have a good title.⁷ If the writ be against one of two partners, the sheriff may seize their joint property, although in undivided moieties; he may, therefore, sell an undivided moiety, and the vendee will be tenant in

¹ Shep. Touch. 169, 471.

² Rumball v. Murray, 3 T. R. 298.

³ Taylor v. Cole, 3 T. R. 292.

⁴ Doe v. Jones, 9 M. & W. 372; s. c. 1 Dowl. Pr. R. n. s. 352.

⁵ Doe v. Donston, 1 B. & A. 230.

⁶ Barnard v. Leigh, 1 Stark. 43.

⁷ Doe v. Brawn, 5 B. & A. 243.

common with the other partner.¹ Where an outgoing tenant agreed to assign the remainder of his term, it has been held that the sheriff, before any actual assignment made, may sell the term under an execution against the tenant, and put upon it the value agreed to be given by the incoming tenant.² The purchaser becomes an assignee in law, and so liable upon the covenants in the lease; while the lessee continues liable, notwithstanding the lease is taken from him without his consent.³

SECTION II.

THE RIGHTS AND LIABILITIES OF AN ASSIGNEE.

§ 436. A lessee, during his occupation, holds both by privity of estate and of contract. His *privity of estate* depends upon and is co-existent with the continuance of his term. By an assignment, he divests himself of this privity and transfers it to his assignee; it remains annexed to the estate, into whose possession soever the lands may pass, and the assignee always holds in privity of estate with the original landlord. The *privity of contract*, however, is not transmitted to the purchaser, on an assignment by the lessee; for his express covenants will, during the term, be obligatory upon him and his personal representatives, even for breaches after an assignment and acceptance of rent by the lessor;⁴ but in the case of covenants in law, after an assignment of the term, no action lies against the assignor.⁵

§ 437. An assignee takes all the interest of the assignor in the thing assigned, whether in possession, or expectancy;⁶ but he takes it subject to all equities to which the original party is subject, and must therefore perform all covenants which are annexed to the estate so long as he is in possession.⁷ For when a covenant relates to,

¹ Haydon v. Haydon, 1 Salk. 392; Enys v. Donnithorne, 2 Burr. 1190; Gordon v. George, 12 Ind. 408.

² Sparrow v. Bristol, 1 Marsh. 10.

³ Auriol v. Mills, 4 T. R. 98; Holford v. Hatch, 1 Doug. 184.

⁴ Walton v. Cronly, 14 Wend. 63; Auriol v. Mills, 4 T. R. 94; Port v. Jackson, 17 Johns. 239; Kunckle v. Wynick, 1 Dal. 306; Moale v. Tyson, 2 Har. & McH. 387; Buckland v. Hall, 8 Ves. 92.

⁵ Bacheloure v. Gage, Cro. Car. 188;

⁶ Equitable as well as legal interests pass by an assignment. Thus where the lessor's covenant to pay for improvement, did not run at law because assigns were not named therein; held, nevertheless, that the assignee could sue thereon in the assignor's name. Thompson v. Rose, 8 Cow. 266.

⁷ Thus where lessee was trustee for

or is to operate upon, a thing in being, parcel of the demise, the thing to be done by force of the covenant is, as it were, annexed to the thing demised, and goes with the land, binding the assignee to performance, though not named: and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land.¹ If it is a covenant concerning a thing not *in esse* at the time of the demise, but is to be done upon the land, as to build a new wall, the assignee will also be bound, if expressly named, because he is to receive the benefit of it.² Among the covenants to which the liability of an assignee extends, are the covenants to repair, pay rent, taxes, or assessments, if such was the obligation of the lessee; to permit the lessor to have free passage through the house to two rooms, which had been excepted in the lease; to cultivate the lands in a particular manner; supply the premises with a sufficient quantity of water; or not to carry on particular trades.³

§ 438. A lessee may assign his rights and interest in the premises, but *cannot thereby discharge himself* of his obligations; for this would be unreasonably to deprive the landlord, without his consent, of the benefit of a contract made with a particular tenant, to whose care and responsibility he trusted when he granted the lease. The lessee, therefore, remains liable upon his original contract after his assignment, and may be sued on it, either by the lessor or his grantee,⁴ even if the landlord has accepted the assignee as his tenant, and collected rent from him.⁵ And the same rule holds with regard to an assignment of part of his estate; being still liable on his covenant to pay the entire rent, for he cannot, by his own act,

others, and transferred to them all his interest in the lease; held, they were liable for the performance of his covenant. *Van Schaick v. Third Av. R. R.* 49 Barb. 409.

¹ *Van Rensselaer v. Bonesteel*, 24 Barb. 865; *Blake v. Sanderson*, 1 Gray, 832; *Prettyman v. Walston*, 84 Ill. 175, 190.

² *Norman v. Wells*, 17 Wend. 186; *Dunbar v. Jumper*, 2 Yeates, 74; *Taylor v. Owen*, 2 Blackf. 301; *Plymouth v. Carver*, 16 Pick. 183; *Spencer's case*, 5 Co. 16.

³ *Norton v. Vultee*, 1 Hall, 384; *Jacques v. Short*, 20 Barb. 269; *Allen v. Culver*, 8 Den. 284; *Verplanck v. Wright*, 23 Wend. 506; *Harley v. King*, 5 Tyr. 692; *Philpot v. Hoare*, 2 Atk. 219; *Graves v. Porter*, 11 Barb. 592; *Jourdain v. Wilson*, 4 B. & A. 286; *Cockson v. Cock*, Cro. Jac. 125; *Bally v. Wells*, 8 Wils. 82. A covenant

tending to the support and maintenance of the thing demised, is annexed to and passes with the reversion. *Sampson v. Easterby*, 9 B. & C. 505. And see *ante*, § 262. A conveyance of premises to which a demised water privilege is appurtenant, is sufficient to charge the grantee with rent, as assignee of the lease of the privilege. *Provost v. Calder*, 2 Wend. 517. As to covenants running with the land, see *ante*, § 260.

⁴ *Barnard v. Godacall*, Cro. Jac. 309; *Thursby v. Plant*, 1 Saund. 240; *Brett v. Cumberland*, Cro. Jac. 521; *Garner v. Byard*, 23 Ga. 289.

⁵ *Walton v. Cronly*, 14 Wend. 63; *Shaw v. Partridge*, 17 Vt. 626; *Fisher v. Ameers*, 1 Brownl. & G. 20; *Brett v. Cumberland*, *supra*; *Arthur v. Vanderplank*, 7 Mod. 198; *Bailey v. Wells*, 8 Wisc. 141.

apportion it.¹ Nor can a lessee discharge himself from the *implied* covenants, by an assignment without the consent of the lessor; since the original privity of estate existing between them cannot be destroyed without the landlord's concurrence: but an assent may be inferred from the lessor's receiving rent from the assignee, or recognizing him in some other way as his tenant.² And as the assignment of a lessee by his own act will not discharge him from his express covenant, so neither will an assignment by the act of the law; and, therefore, if the lease be taken from him, and sold under a judgment and execution against him, he still remains liable upon all his express covenants.³

§ 439. It is a well-established rule of law, that no person can take advantage of a covenant or condition, except such as are parties or privies thereto; consequently, *the assignee of the reversion* could at common law neither sue or be sued upon covenants contained in a demise, whether for life or years. This right was reserved to the grantor and his heirs, who alone might take advantage of a condition broken; the assignee of the reversion being considered a mere stranger for such purposes.⁴ The principle seems to have followed, as a necessary consequence of the feudal law, which prevented a lord from transferring his seigniorship without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation. This consent of the tenant was expressed by what was called *attorning*, or professing to become the tenant of the new lord.⁵ The doctrine extended to all

¹ *Broom v. Hore*, Cro. El. 683; *Wadham v. Marlowe*, 8 East, 814, n.; *Buckland v. Hall*, 8 Ves. 92; *Staines v. Morris*, 1 Ves. & B. 11; *Van Rensselaer v. Chadwick*, 24 Barb. 383; *Same v. Gifford*, *ib.* 349.

² *Wadham v. Marlow*, 8 East, 816; *Marsh v. Brace*, Cro. Jac. 834; *Thursby v. Plant*, 1 Saund. 240, n. 6; *Shine v. Dillon*, 1 Ir. R. Com. L. 277; where debt for use and occupation was held to lie against a lessee who had assigned without lessor's assent, because the holding still continued. If a lessee underlets a portion of the demised premises, and the undertenant is recognized as such, and rent demanded of him by the lessor, the lessee and sub-tenant are not jointly liable to the lessor for the rent of the whole premises. *Fifty Associates v. Howland*, 5 Cush. 214.

³ *Hornby v. Houlditch*, Andrews, 40; *Auriol v. Mills*, 4 T. R. 99. An action

will lie on a covenant in a deed against a lessee, notwithstanding a third person be at the time the actual tenant, and the lessor has recognized him as such; and against his executors, notwithstanding he may have assigned during his lifetime, and the rent may have accrued subsequent to his death. *Brett v. Cumberland*, Cro. Jac. 522; *Coghil v. Free-love*, 8 Mod. 828.

⁴ Co. Lit. 215, a; *Milnes v. Branch*, 5 Maule & S. 411.

⁵ An attornment is the acknowledgment by the tenant of a new landlord, after a transfer of the premises, and his agreement to become tenant to the purchaser. *Lindley v. Dakin*, 18 Ind. 388. When made to a stranger, it is void. *Payne v. Vandever*, 17 Ky. 14. And in Louisiana, forfeits the lease. *Richardson v. Scott*, 6 La. 54.

lessees, whether for life or for years; and if a man purchased an estate, with the lease outstanding upon it, and the lessee refused to attorn to the purchaser, or become his tenant, the grant or contract was void, or at least incomplete. But as experience afterwards showed that property best answers the purposes of civil life, when its transfer and circulation are entirely free, this restraint upon alienation was gradually taken off by several English statutes, and more particularly by the statute of 32 Hen. VIII. c. 34, which enabled assignees of the reversion to take advantage of such conditions, and gave the tenant the like remedies against the assignee that he would have had against the assignor. By it the privity of contract, together with the privity of estate, were transferred to the assignee of the reversion; who then stood, with regard to a tenant, in the same plight that the lessor did before he parted with the reversion. But this statute only applied to leases by deed.¹

§ 440. This statute did not apply to demises in fee or aid the recovery of rent therein reserved, for there there was no reversion,² nor did it apply to rent when severed from the reversion. But even at common law it is said the assignee might sue on the lessee's covenants in law,³ and the assignee of a rent might always have debt for arrears thereof.⁴ It has also been stated that he might have covenant, but this does not seem to be the common-law doctrine, although maintained in some states.⁵

§ 441. The Revised Statutes of New York now give an assignee the benefit of *any agreement* contained in the lease assigned; so that

¹ *Standen v. Christmas*, 10 Q. B. 185; *Bickford v. Parson*, 5 C. B. 920. It is in force in New York; *New Hampshire*, *Mussey v. Holt*, 4 Foster, 248; *Maryland*, *Funk v. Kincaid*, 5 Md. 404; *New Jersey*, *Rev. Stat.* 643; *Missouri*, *Rev. Stat.* 32, § 11; *Pennsylvania*, 8 Binn. 625; *Alabama*, *English v. Key*, 89 Ala. 118; *Massachusetts*, *Patten v. Deshon*, 1 Gray, 825. But not in Ohio, Connecticut, or South Carolina.

² *Co. Lit.* 215, a.

³ *Willard v. Tillman*, 2 Hill, 274; *Vyvyan v. Arthur*, 1 B. & C. 410.

⁴ *Ards v. Watkin*, Cro. El. 637, 651; *Newcomb v. Harvey*, Carth. 161; *Allen v. Bryan*, 5 B. & C. 512; *Clarke v. Coughlan*, 3 Ir. Law, 427; *Williams v. Hayward*, 1 Ellis & E. 1040; *Marle v. Flake*, 3 Salk. 118; *Howland v. Coffin*, 14 Pick. 125; *Patten v. Deshon*, 1 Gray, 826.

⁵ In *Baldwin v. Walker*, 21 Conn. 168, 181, it is admitted that debt and

not covenant lay at common law; though the local law of Connecticut was otherwise. In *Willard v. Tillman*, 2 Hill, 274, it is thought by *Bronson, J.*, to be settled in New York, that covenant lay, though he doubted the correctness of the doctrine. But *Demarest v. Willard*, 8 Cow. 206, to which he referred, merely held that the reversioner could not maintain an action of covenant for instalments accruing after he had assigned the rent. There is therefore no authority for the doctrine when the rent is on a lease for years. But where the lease is in fee, such an action has been maintained; *Streaper v. Fisher*, 1 Rawle, 155; *St. Mary's Church v. Miles*, 1 Whart. 229; and in New York, in *Van Rensselaer v. Read*, 26 N. Y. 558. But these cases, which can only go on the ground that the lessee's covenant runs with the rent as an incorporeal hereditament, have been examined fully, *ante*, note 5 to § 261.

an assignee, whether of the reversion or of the term, may have the advantage of all covenants contained in the lease, whether *express* or *implied*. "The grantees of any demised lands, tenements, rents, or other hereditaments, or the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representative of the lessor, grantee, or assignee, shall have the same remedies by entry, action, distress, or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for doing any waste, or other cause of forfeiture, as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor." While the next section provides, "the lessees of any lands, their assigns, or personal representatives, shall have the same remedy, by action or otherwise, against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against encumbrances, or relating to the title or possession of the premises."¹ "The provisions of these two sections extend as well to grants or leases in fee, reserving rents, as to leases for life and for years."² Upon the principle of this statute, the Court of Appeals in New York hold, that an annual rent-charge, reserved by deed, upon a grant in fee is valid as a rent-charge, notwithstanding there is no reversion in the person entitled to it; that such a rent is a hereditament, descendible and devisable for ever, and that a devisee or assignee thereof may maintain an action for its recovery against any person in possession of the land; for that the covenant to pay such rent runs with the land, and is binding upon the heir or assignee of the grantee by force of the statute, independent of any tenure or reversion.³

¹ The provisions of this statute, it is said in *Norman v. Wells*, 17 Wend. 186, are in substance a transcript of 32 Hen. VIII. ch. 34, and do not extend to collateral covenants, but only to covenants touching or concerning the thing demised. And in *Harbeck v. Sylvester*, 18 Wend. 608, it was decided that the remedies of a grantee of demised premises are confined to remedies upon the lease; but see *Allen v. Culver*, 3 Den. 284. Nor does the statute apply to an assignment of rent in arrear, without a transfer of the lease or land. *Slocum v. Clark*, 2 Hill, 475.

² 1 N. Y. R. S. 747, §§ 23-25. The assignee of an assignee, as well of a reversion as of the term, is now said, in the

later English cases, to have the same rights, both at common law and under the statute, as the first assignee. *Hornidge v. Wilson*, 8 Per. & D. 641; *Campbell v. Lewis*, 3 B. & A. 392; *Fryer v. Coombs*, 11 Ad. & E. 408. Under this statute the grantee of the reversion can only take advantage of such covenants as run with the land. *Dolph v. White*, 12 N. Y. 296. Where a lessor who has taken the lessee's notes to secure the payment of rent grants the land absolutely, the title to the notes as well as to the land passes, unless they have been parted with by the lessor, who will then be personally liable for the amount. *Beebe v. Coleman*, 8 Paige, 392.

³ *Van Rensselaer v. Hays*, 19 N. Y. 68.

§ 442. Nor were the interests of the tenant disregarded in the passage of these acts of the legislature, for they expressly declare, he shall not be prejudiced by payment of any rent to the old landlord before he received notice of the change of interest; and the effect of the statute has been to substitute for an attornment, the necessity of giving notice to the tenant before he can be sued by an assignee, for rent accruing after the assignment. After an attornment, or its equivalent notice, the tenant continues to hold upon the same terms that he held under his former landlord,¹ the instrument of attornment becomes in fact an agreement for a new tenancy.² Where a man, however, thus attorns tenant to another, he is not thereby estopped from disputing his title; for he may, by mistake, have attorned to a person who has no title.³ The necessity of a formal attornment, in order to complete a grant of the reversion, was finally abolished by the statute of 4 Anne, c. 16, s. 9, which has been generally adopted throughout the United States,

In this case, Stephen Van Rensselaer, the patroon, father of the plaintiff, in consideration of certain yearly rents, covenants, and conditions contained in the indenture, granted, bargained, and sold to Jacob Deitz, a certain farm in the county of Albany, to him and his heirs for ever, *yielding and paying* therefor, yearly and every year, the yearly rent of thirty bushels of wheat, &c.; with a clause authorizing the grantor, his heirs or assigns, to re-enter, if the rent should not be paid, and no sufficient distress could be found on the premises. The elder Van Rensselaer died, after having devised the reserved rent to the plaintiff; and the defendant had purchased a portion of the premises from Deitz, and was in possession thereof. The defendant contended that this covenant for the payment of rent was personal, between the grantor and grantee, or what is usually known as a covenant in gross; and that consequently, after the death of the original parties, no action to recover rent could be maintained in favor of, or against any persons, except their respective executors or administrators. That the law did not permit arrangements by which a rent could be reserved, upon a conveyance in fee, and that the reservation did not therefore affect the title to the land, but the conveyance was absolute and unconditional. But the court held, with the admirable opinion of Judge Denio, that by the conveyance a valid rent was reserved and charged upon the land, available to the grantor beyond all question, so long as he lived; that the statute gave to his grantee or devisee, the

same remedies which the grantor himself had or might have had, if the reversion had remained in him, and that this right existed independent of any tenure or reversion. And furthermore, that the covenant to pay rent was a covenant running with the land, and in this case formed, in fact, the consideration of the grant, and was, consequently, binding upon every assignee of the land; and that the statute intended to establish a privity of contract, between those holding a derivative title, under both grantors and grantees, placing the assignees of both parties, upon grants in fee, where a rent was reserved, upon the same footing which was occupied by the assignees of the parties to a lease for life or years, under the statute of Henry VIII., and the re-enactment of it in this country. A right of action for the payment of such a rent passes to the assignee of the rent at common law, independently of the act of 1805, ch. 98; 1 R. S. 747, §§ 23-25, or of the code; and is maintainable against the grantee or assignee of the covenantor, by virtue of that privity of estate which subsists between the grantee of the land out of which it issues, although there is no reversion in the former or his grantor. *Van Rensselaer v. Read*, 26 N. Y. 558.

¹ Per Holroyd, J., in *Cornish v. Scarell*, 8 B. & C. 471-476.

² *Doe v. Boulter*, 6 Ad. & E. 675; *Doe v. Smith*, 8 id. 255; *Cornish v. Scarell*, *supra*; *Peckham v. Leary*, 6 Duer, 494.

³ *Gravenor v. Woodhouse*, 1 Bing. 38; *Gregory v. Doidge*, 8 id. 474.

so that an assignment by the landlord is now valid without the ceremony of an attornment.¹ The title of a grantee of the reversion being complete without an attornment of the tenant, he will be entitled to all arrears of rent that accrue after the execution of the conveyance, and not paid to the grantor, by the tenant, in default of notice.² But the payment of rent to the grantor, by his tenant, before notice of the grant, is binding upon the grantee; nor will the tenant be liable to such grantee for any other breach of the condition of the demise until he shall have had notice of the grant.³

§ 443. Where a covenant *running with the land is divisible* in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*, and the assignee will be answerable for his proportion only of any charge upon the land, which was a common burden upon the whole; and will be exclusively liable for the breach of any covenant which related to that part alone.⁴ The statute extends to the assignee of part of the reversion in all the land; and to the assignee of the reversion of part of the land; each of whom may have an action of covenant by virtue of the statute.⁵ The assignee or grantee of the reversion may sue, though he be not named in the lease;⁶ and if there be a second reversioner, he may, it seems, also sue for any breach affecting the value of his interest, and each reversioner will recover damages according to the extent of the interest affected.⁷ A grantee of the reversion of part of the premises cannot, however, bring ejectment on a con-

¹ Farley v. Thompson, 15 Mass. 18; Burden v. Thayer, 8 Metc. 76; Baldwin v. Walker, 21 Conn. 168; Coker v. Pear-sall, 6 Ala. 542.

² Birch v. Wright, 1 T. R. 878; Ruckman v. Astor, 3 Edw. 373; 1 R. S. 739; Gibbs v. Ross, 2 T. R. 437; Breeding's Heirs v. Taylor's Heirs, 18 Ky. 481.

³ Co. Lit. 215, b.; Sweetman v. Cash, Cro. Jac. 8; Molineaux v. Molineaux, *ib.* 145; 1 R. S. 739, § 146; Farley v. Thompson, 15 Mass. 26. An attornment to one having no color of title is void. Jackson v. Delancy, 13 Johns. 537. The tenants taking a lease from an adverse claimant of title is a fraudulent attornment and void. Jackson v. Harper, 5 Wend. 246; Lawrence v. Brown, 5 N. Y. 394.

⁴ Astor v. Miller, 2 Paige, 68; Stevenson v. Lambard, 2 East, 575; Com. Dig. Covenant, B. 3; Burton v. Barclay, 7 Bing. 745. "Covenants," said Wilmot, C. J., in Bally v. Wells, Wilmot, 844, cited by Cowen, J., in Norman v. Wells, 17 Wend.

145, "which run and rest with the land, lie for or against an assignee, at common law, though not named. They stick so fast to the thing on which they wait, that they follow every particle of it." And see Van Rensselaer v. Bradley, 8 Den. 185; Same v. Gallup, 5 *id.* 454.

⁵ Co. Lit. 215; Lewes v. Ridge, Cro. El. 868; Thursby v. Plant, 1 Saund. 241; Simpson v. Clayton, 6 Scott, 469; Twyman v. Pickard, 2 B. & A. 105. By Massachusetts Gen. Stat. chap. 90, sec. 24, every person in possession of land, whether it was originally demised in fee or for any other estate of freehold or for a term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised.

⁶ Kitchin v. Buckley, T. Ray, 80; Platt on Covenants, 539.

⁷ Jesser v. Gifford, 4 Burr. 2141; Evelyn v. Raddish, Holt. 543; Attersol v. Stevens, 1 Taunt. 194.

dition broken ; for a condition is entire, and cannot be apportioned.¹ Neither can the grantor of part of the reversion take advantage of a condition ; for it is destroyed by the grant, being confined to such conditions as are incident to the reversion, or for the benefit of the estate.²

§ 444. An assignee is chargeable, as we have seen, by privity of estate, only upon covenants running with the land ; and, therefore, if the covenant be with the lessee and his assigns, but the thing to be done is merely collateral to the land, and does not touch or concern the thing demised in any way, the assignee will not be charged.³ As if the lessee covenants for himself and his assigns to build a house upon the land of the lessor, which is no part of the demise ; or to pay a collateral sum to the lessor, or to a stranger ; it will not bind his assignee, because it is merely collateral to, and in no manner touches or concerns the thing that was demised, or that is assigned ; and, therefore, the assignee can no more be charged with it than any other stranger.⁴ Neither will the assignee of a lease, become chargeable with the covenant of a lessor, to purchase at an appraisal such permanent improvements as should be erected by the lessee, notwithstanding he may have gone into possession, with a full knowledge of all the circumstances.⁵ But whatever the liability of an assignee may be, it continues so long as he remains in possession, either by himself or by his under-tenants, for the possession of his tenant is his possession. Each successive occupant of the premises, other than the original lessee, is also liable for rent to the lessor, by reason of, and for the term of, his own possession ; possession is both the foundation and the boundary of such liability.⁶

§ 445. As an assignee is bound by covenants real annexed to the

¹ 5 Co. 55, b ; *Twynam v. Pickard*, 2 B. & A. 109.

² 3 Kent, Com. 123.

³ *Spencer's case*, 5 Co. 16, b ; *Norman v. Wells*, 17 Wend. 186 ; and see *ante*, § 260.

⁴ *Ib.* ; *Mayho v. Buckhurst*, Cro. Jac. 488. See § 460.

⁵ *Coffin v. Talman*, 8 N. Y. 465 ; "There is no case to sustain us in holding that the covenant which provides for payment at the end of the term, for buildings erected on the demised premises, is a continuing covenant, running with the land, or that the non-payment of the amount, or failure to name an appraiser, in order to ascertain the amount, is a 'continual breach,' for which the grantee of

the reversion should be liable, though it did not happen in his time. The breach happened in the time of the lessor, and he was unquestionably liable for the whole value of the building, but his assignee is not liable." Per Johnson, J.

⁶ *Carter v. Hammett*, 18 Barb. 608 ; s. c. 12 Barb. 258. And the fact that the sub-tenant, upon his written order, paid rent to the original landlord, does not alter the case. *Ib.* An assignment of the farm may be presumed, from the mere possession of a third party. *Cross v. Upson*, 17 Wisc. 618 ; *Mariner v. Crocker*, 18 *id.* 251. Use and occupation may be maintained against such assignee. *Sears v. Trowbridge*, 16 Gray, 184.

estate, he is also entitled to the advantages of any such covenants as make in his favor; except where the breach has happened before his own time.¹ The lessor is, therefore, liable to an assignee of the lease, on his covenants, for quiet enjoyment;² for further assurance;³ to renew the lease, repair the premises, and the like.⁴ And, as a general rule, where covenants running with the land are broken after the land has come into the possession of an assignee, he only can bring an action for the damages arising therefrom;⁵ unless the nature of the assignment to him is such that the assignor is bound to indemnify him against such breaches of covenant.⁶ For as to such covenants, even a release by the grantee or assignee will not operate as a discharge to subsequent assignees of the same land.⁷ But an assignee can only sue for breaches of covenant that occurred in his time, and not for such as were committed before the assignment, which are mere choses in action, and so not assignable.⁸

§ 446. Upon common-law principles, however, to entitle an assignee to sue on covenants annexed to his reversion, he must, when the cause of action accrues, have the same estate, as was left in the lord on creating the tenure, if to that alone the covenants were annexed; hence, if the reversion be for years, and the assignee takes a conveyance of the fee, the estate to which the covenants were annexed being merged, the covenants are merged in it. And if two persons are parties on the same side, to a deed of demise,—for example, mortgagor and mortgagee,—of whom one (the mortgagee) has a right to lease, the other (the mortgagor) has not; the latter may either refuse to join with the former in demising, or by joining, admit his own want of title; for the covenants by the lessee are with the latter only. And though the covenants are available by the mortgagor, being founded upon the

¹ *Martin v. Baker*, 5 Blackf. 282; *Lewes v. Ridge*, Cro. El. 868; *London v. Richmond*, 2 Vern. 428.

² *Noke v. Awder*, Cro. El. 373; *Campbell v. Lewis*, 8 B. & A. 392; *Portmore v. Bunn*, 3 D. & R. 145. A lessee who assigns his term merely is not liable to his assignee for an eviction by one claiming under the lessor, except upon an express covenant of warranty. *Waldo v. Hall*, 14 Mass. 486.

³ *King v. Jones*, 5 Taunt. 418; *Midlemore v. Goodale*, Cro. Car. 508.

⁴ *Vernon v. Smith*, 5 B. & A. 11; *Roe v. Hayley*, 12 East, 469; *Furnival v. Crew*, 3 Atk. 88; *Spencer's case*, 5 Co. 16; *Van Horn v. Crain*, 1 Paige, 455.

⁵ *Griffin v. Fairbrother*, 1 Fairf. 91.

⁶ *Bickford v. Page*, 2 Mass. 460; *Kane v. Sanger*, 14 Johns. 89.

⁷ *Abby v. Goodrich*, 3 Day, 488.

⁸ *Com. Dig. Covenant* (B. 3); *Shelby v. Hearne*, 6 Yerg. 512. Since the tortious destruction of buildings on demised premises, though by a stranger, is waste, for which a tenant for years or for life is liable to the reversioner, irrespective of any express agreement, assignees of a term for years, may have an action on the case against a stranger, for a negligent destruction of buildings on the premises. *Cook v. Champl. Transp. Co.*, 1 Den. 91.

condition that he has granted the lease, still they are mere independent contracts, and have no connection with the tenure to which, as it only subsists between the party demising and the covenantor, the mortgagor is a stranger; therefore, on an assignment of the reversion they do not pass to the assignee, but remain available by the mortgagor.¹

§ 447. After the lessor has parted with his reversion, he cannot bring an action for the breach of any covenant which has occurred subsequent to his grant, except on such covenants as are collateral to and do not run with the land, for if he might, the tenant would be liable to two actions for the same thing, one in favor of the landlord, and the other of the grantee.² But as rent reserved is in the nature of an incorporeal hereditament, it differs herein from the other obligations of the lessee, and rent yet to grow due may be assigned without the reversion, or retained when the reversion is assigned,³ and an action of debt lies for arrears thereafter accruing, without the reversion; but not an action of covenant.⁴ Rent already in arrear is a mere chose in action, and not assignable so as to give an action in the name of the assignee. But if not severed, rent yet to accrue follows the reversion as an incident, into the hands of the assignee; even the purchaser at a sheriff's sale;⁵ nor will the promise of the lessee to pay the assignor carry any right of action.⁶ But payment of rent to him will be good as against the assignee, until the lessee have notice of the assignment; even although the rent be paid⁷ in advance.⁷

§ 448. *As between the lessor and an under-tenant* of the original lessee, there is neither privity of estate nor of contract; so that between these parties there can be no advantage taken of the covenants dependent upon a lease either *in law* or *in deed*; therefore, the lessor cannot sue an under-tenant, upon the lessee's covenant to pay rent.⁸ But the assignee of the lessor's interest in a lease, who has been recognized as such by the tenant, may sue in

¹ Webb v. Russell, 8 T. R. 393; Stokes v. Russell, *ib.* 678; s. c. 1 H. Bl. 562.

² Beely v. Parry, 8 Lev. 154; Thursby v. Plant, 1 Saund. 241, b.

³ *Ante*, § 426.

⁴ *Ante*, § 441 and note.

⁵ Bank of Pennsylvania v. Wise, 3 Watts, 394; Van Wicklen v. Paulson, 14 Barb. 654.

⁶ Stout v. Kean, 3 Harringt. 82; Sharp.

v. Key, 8 M. & W. 379; Payne v. Beal, 4 Den. 406.

⁷ Farley v. Thompson, 15 Mass. 18; Stone v. Patterson, 19 Pick. 476.

⁸ Quackenboos v. Clarke, 12 Wend. 555; *ante*, § 108; Holford v. Hatch, Doug. 183. Nor can he maintain an action for use and occupation against the under-tenant, unless under an agreement. Jennings v. Alexander, 1 Hilt. 154.

his own name for rent, although he has no interest in the reversion.¹ A lessee assigning can have no right of action on any covenant in the lease against his assignee, for he has no residuary interest.² But a lessee who assigns is entitled to be indemnified by his assignee against the payment of rent, and the performance of covenants in the original lease, since his liability continues, although he is not in possession.³ Where, however, an assignee covenants absolutely to pay, and perform all the covenants of the lessee, it is not a mere covenant for indemnity; but he renders himself directly liable to the lessee upon every default, whether the latter has been called on for rent or not.⁴

§ 449. An assignee of a lease is liable, as we have said, only in respect of his possession; he bears the burden while he enjoys the benefit; and if the whole term of years is not passed over to him, *a day only being reserved by the lessee*, he is not liable to the landlord at all on such covenants; for he is then considered only an under-tenant, and not an assignee.⁵ As assignee, he is liable only for covenants broken while he remains possessed of the estates;⁶ and, although he assigns over, he is, notwithstanding, liable for all such breaches as occurred during the time of his enjoyment, because the right of action having once vested in the lessor, for breaches committed by him as assignee, cannot be divested by a reassignment, although the privity of estate may be destroyed between them, and a privity of contract never existed.⁷ But he is not chargeable for a breach of covenant happening after his assignment, for the privity of estate is wanting;⁸ nor, for the same reason, is he liable upon a breach which happened previous to the assignment to him. As where a lessee covenanted to build and

¹ *Moffatt v. Smith*, 4 N. Y. 126. In this case the lessor had assigned the lease, without the reversion, and the lessee paid rent to the assignee, and it was held that this created such a privity of contract between the tenant and the assignee, that the latter might sue in his own name for rent subsequently accruing under the lease.

² *Hicks v. Downing*, 1 Ld. Ray. 99.

³ *Staines v. Morris*, 1 Ves. & B. 8; *Pember v. Mathers*, 1 Bro. Ch. 52.

⁴ *Jackson v. Port*, 17 Johns. 479. But though a lessor who has accepted rent from the assignee of his lessee, can still hold the lessee on his express covenants, he cannot maintain debt against him. *Fletcher v. McFarlane*, 12 Mass. 48; *Wall v. Hinds*, 4 Gray, 256.

⁵ *Farmers Bank v. The Mut. Ass. Co.*, 4 Leigh, 69; *Davis v. Morris*, 38 N. Y. 589; *Holford v. Hatch*, 1 Doug. 186, n.; *Milnes v. Branch*, 5 Maule & S. 411; *Goddard v. Keate*, 1 Vern. 87; *Derby v. Taylor*, 1 East, 502; *Brewer v. Hill*, 2 Anst. 418; *Church v. Brown*, 15 Ves. 265.

⁶ *Armstrong v. Wheeler*, 9 Cow. 88; *Pitcher v. Tovey*, 4 Mod. 71; s. c. 8 Lev. 295; *London v. Richmond*, 2 Vern. 421; *Staines v. Morris*, 1 Ves. & B. 11; *Jackson v. Port*, *supra*.

⁷ *Harley v. King*, 2 Cr., M. & R. 22; *Onslow v. Corrie*, 2 Madd. 830; *Valliant v. Dodemede*, 2 Atk. 546; *Treackle v. Coke*, 1 Vern. 165.

⁸ *Barnfather v. Jordan*, Doug. 452; Co. Lit. 8, a, 856, a.

finish a house within a certain time, and, after that time had expired, assigned the lease; it was held that this covenant should not bind the assignee, inasmuch as it was broken before the assignment was made to him; though it would have been otherwise if the lessee had executed the assignment before the time specified for finishing the house had expired.¹ It is otherwise, also, where there is a continuing breach; as if there be a covenant to repair within a certain time after notice, if the lessee does not repair upon notice by the assignee, an action lies, though it was out of repair before the assignment.² Although an eviction out of part of the estate will discharge a lessee from the payment of any rent, the case is different with an assignee; for if he is turned out of possession of part of the premises, he must pay rent for so much of it as he has not been put out of the possession of, being liable upon his real contract in respect of the land.³

§ 450. An actual entry upon the demised premises, by an assignee of the lessee, is not requisite, in order to charge him with the performance of covenants running with the land; for, by accepting an interest under the conveyance, he incurs all the responsibility connected with the estate, as if he had taken possession in fact.⁴ The same rule applies to the assignee of an assignee: and, whether the second assignee enter upon the premises or not is unimportant; for, by the assignment, the title and possessory right pass, and the assignee becomes sufficiently possessed to discharge the prior assignee from the burden of the covenants, and to render him liable for all breaches of covenant happening after the assignment to him.⁵ But a lessor cannot maintain an action of covenant for arrears of rent, against a party occupying demised premises, charging him as assignee, when in fact he never had an assignment of the lease.⁶ Possession, however, by the defendant, is sufficient evidence, *prima facie*, to charge him as assignee, for the non-payment of rent; yet he may prove that he is not assignee.⁷

¹ *St. Saviour v. Smith*, 8 Burr. 1271; *Grescott v. Green*, 1 Salk. 199; *Tillotson v. Boyd*, 4 Sandf. 516.

² Com. Dig. tit. Covenant (B).

³ *Stevenson v. Lambard*, 2 East, 575.

⁴ *Walton v. Cronly*, 14 Wend. 68; *Walker v. Reeves*, Dougl. 461, n.; *Cook v. Harris*, 1 Ld. Ray. 867; *Odell v. Wake*, *supra*; *Williams v. Bosanquet*, 1 Brod. & B. 288; *Gretton v. Diggles*, 4 Taunt. 766.

⁵ *Walker v. Reeves*, *supra*; *Taylor v. Shum*, 1 B. & P. 21.

⁶ *Quackenboos v. Clark*, 12 Wend. 555.

⁷ *Williams v. Woodard*, 2 Wend. 487; *Acker v. Witherell*, 4 Hill, 112. An assignee may always rebut the presumption arising from his occupation, and prove that he refused to accept the lease under the assignment, as where the assignment was for the benefit of creditors, which did not specifically mention the lease. *Bagley v. Freeman*, 1 Hilt. 196; and see *post*, §§ 458, 459. So *Bedford v. Terhune*, 30 N. Y. 458; *Kain v. Hoxie*, 2 Hilt. 311;

§ 451. When the assignment is by deed, an assignee becomes *liable as such*, by merely accepting the deed; but if a man becomes assignee only by operation of law, he is not, in general, chargeable until he actually enters, or does some act showing his acceptance of the lease.¹ But if a testator dies in possession of a term of years, it vests in the executor; and although it be worth nothing, he cannot waive it, for he must renounce the executorship *in toto* or not at all.² This, however, applies only where the executor has assets, for he may relinquish the lease if the property of the testator be insufficient to pay the rent; and, in case there are assets, to bear the loss for some years, though not during the whole term, he may be bound to continue tenant until the fund is exhausted, when, upon giving notice to the lessor, he may waive the possession.³

§ 452. An assignee may always discharge himself from *liability for subsequent breaches*, both as regards rent and other covenants, by assigning over; even though it be done for the express purpose of getting rid of his responsibility, and although the second assignee neither takes possession nor receives the lease.⁴ As, for instance, by assigning to a beggar;⁵ a *feme covert*;⁶ or a person who is on the eve of quitting the country for ever, provided the assignment be executed before his departure;⁷ and even although the assignee receive from the assignor a premium, as an inducement to accept the transfer.⁸ So if the assignment of the lease remains in the hands of the solicitor of the assignor, who has a lien for the expenses of preparing it, or the lease contains a covenant not to assign.⁹ For the assignment destroys the privity of estate, which was the only ground upon which the assignee was liable; and though the tenant's liability, on his covenant to pay rent, subsists during the continuance of the lease, there is no personal con-

Cross v. Upson, 17 Wisc. 618; Mariner v. Crocker, 18 *id.* 251. Thus in Theological Inst. v. Barbour, 4 Gray, 329, two were lessees at will, and a sale by lessor determined the will; both were thereafter in possession, but it was held that one might show he was tenant to the other, and so not liable to lessor.

¹ Salmon v. Smith, 1 Saund. 203, b; Williams v. Bosanquet, 1 Brod. & B. 288.

² Rubery v. Stevens, 4 B. & A. 241; Hornidge v. Wilson, 8 Per. & D. 641; Woolaston v. Hakewill, 8 Scott, N. R. 618.

³ Woodfall's Landl. & T. 375; Astor v. L'Amoureux, 4 Sandf. 524.

⁴ Armstrong v. Weeler, 9 Cow. 88; Hurst v. Rodney, 1 Wash. 375; Keeling v. Morrice, 12 Mod. 871; Childs v. Clark, 8 Barb. Ch. 52.

⁵ Valliant v. Dodemede, 2 Atk. 546; Taylor v. Shum, 1 B. & P. 21.

⁶ Barnfather v. Jordan, Doug. 452; Co. Lit. 3, a.

⁷ Onslow v. Corrie, 2 Madd. 330.

⁸ Valliant v. Dodemede, *supra*; Johnson v. Sherman, 15 Cal. 287.

⁹ Odell v. Wake, 3 Camp. 394; Thursby v. Plant, 1 Saund. 241, c; Paul v. Nurse, 8 B. & C. 486.

fidence reposed in the assignee of the lessee. And as an assignee is liable to the reversioner by reason of his occupation only, and not by virtue of any privity of contract, it is not necessary for him to show that he has divested himself of the paper title, or legal right; it is enough that he is not in possession during the time for which rent is claimed.¹ But an assignment to a nonentity, or person not in existence, possession remaining unchanged, will be unavailable.² And, to divest himself of all responsibility, an assignee must assign all his estate, otherwise he will be liable *pro tanto*; for covenants running with the land are, as we have seen, devisable, and he would, therefore, remain liable on a covenant to repair, or to pay rent, as to that part of the premises of which he retains possession.³

§ 453. Although the assignee of a lessee who assigns over is liable, both at law and in equity, to an action of covenant for rent accrued during his enjoyment, if an action be brought he may plead, that before any rent was due, he granted all his term to J. S., who by virtue thereof, entered and was possessed; and this will be a good discharge, without alleging that the reversioner had notice of the assignment.⁴ Nor can the plaintiff reply fraud in the assignment, unless he can show a trust. And this principle has been so broadly laid down, that Lord Eldon thought the only case in which a question of fraud could arise was, where the assignor had kept possession of the premises, of which he made a profit, and had made an assignment to avoid responsibility; but even there, if the possession were profitable, there would always be something on the premises for the landlord to distrain; for which reason his lordship doubted whether there ever could be such a thing as a fraudulent assignment and whether an issue on such a point could ever be well taken; the defendants having at all times, a right to divest themselves of their interest, by the mere form of an assignment, which drives the plaintiff to take possession.⁵

§ 454. Where the lessee assigned his interest in demised prem-

¹ *Astor v. L' Amoureux*, 4 Sandf. 524; *Carter v. Hammett*, 18 Barb. 608; *Taylor v. Shum*, 1 B. & P. 23.

² *Taylor v. Shum*, *supra*.

³ *Congham v. King*, Cro. Car. 221. A general release of the lessee, after an assignment, does discharge an assignee's liability for use and occupation. *McKeon v. Whitney*, 8 Den. 452. If an assignee of a lease, who has not covenanted to pay

rent, assigns over and takes an agreement from his assignee, to pay rent to him, the agreement is without consideration, and void. *Stoppani v. Richard*, 1 Hilt. 509.

⁴ *Harley v. King*, 1 Gale, 100.

⁵ 1 Bull. N. P. 164; *Pitcher v. Tovey*, 4 Mod. 71; s. c. 12 *id.* 23; *Chancellor v. Poole*, Doug. 764; *Taylor v. Shum*, *supra*; *Cook v. Harris*, 1 Ld. Ray. 367.

ises, by an indenture executed by both parties, "subject to the payment of the rent, and performance of the covenants and agreements reserved and contained in the original lease;" the assignee took possession, occupied the premises, and, before the expiration of the term, assigned to a third person, and after the first assignment, the lessee was obliged to pay to the lessor rent, which the assignee had suffered to be in arrear; it was held that the lessee could not maintain an action of covenant against the assignee, in respect to such breach, the words, "subject to the payment of rent," &c., being words of qualification, and not words of contract.¹ So where upon a lease for years, the lessee covenants for himself and his assigns, to pay the rent, so long as he and they shall have the possession of the thing let, and the lessee assigns, and the time expires, and the assignee continues in possession afterwards; an action of covenant will lie against him for rent in arrear, after the expiration of the term, for though he is not an assignee strictly, according to the rules of law, yet he shall be accounted such an assignee as will make him liable to perform the covenants.² And there is no difference with respect to the executor or administrator of a lessee for years, for they may, like any other assignee, assign the term, and divest themselves of all liability upon the privity of estate, but not upon the privity of contract; and so, it will be seen, may the assignees of a bankrupt lessee.³

§ 455. In New York it is held that *the mortgagee of a term*, who has never taken possession under the mortgage, is not an assignee of the whole term, or liable for rent in arrear; because he has not all the estate, right, title, and interest of the mortgagor, the mortgage being but a security to the mortgagee, and the legal estate still remaining in the mortgagor.⁴ But in England and those States where the common-law doctrine of mortgage exists, a contrary rule prevails; and a mortgagee, although he has had the lease assigned to him as a security merely, is held to be seised of the legal estate, and is liable, as assignee, whether in possession or not.⁵ And in all cases after a mortgagee has taken possession, he

¹ *Wolveridge v. Steward*, 3 Moore & S. 561. *Angelrodt*, 16 Mo. 283; *Polhemus v. Trainer*, 30 Cal. 685.

² *Bac. Abr. tit. Covenant* (E. 8).

³ *Auriol v. Mills*, 4 T. R. 94; *Esp. N. P.* 201; *Onslow v. Corrie*, 2 Madd. 330.

⁴ *Walton v. Cronly*, 14 Wend. 63; *Astor v. Hoyt*, 5 *id.* 603. So *McKee v.*

Williams v. Bosanquet, 1 Brod. & B. 238; *Flight v. Bentley*, 7 Sim. 149. But see *Moore v. Choat*, 8 Sim. 508; *Close v. Wilberforce*, 1 Beav. 112. So in New Hampshire, *McMurphy v. Minot*, 4 N. H. 251; while in the U. S. courts it is

is to be deemed an assignee for all practical purposes; the same principle having been held to apply where, as mortgagee, he had obtained a fund which had been awarded to the lessor for damages on taking the leasehold premises for public use.¹

§ 456. *An assignee of a bankrupt*, who enters upon and makes use of the leased premises as part of the assigned estate, as well as the purchaser of a term of years from the sheriff under an execution, are liable for the lessee's covenants;² but not unless they take possession, assume the management of the premises, or do some other act indicating an intention to accept the term.³ Nor will they, in such case, be liable to rent in arrear accrued subsequent to the bankruptcy, of premises which had been the bankrupt's;⁴ the bankrupt himself remaining liable upon all his implied covenants, and for all rent becoming due after his discharge.⁵ Under the bankrupt system of England, and, according to the provisions of the late bankrupt law of the United States, the discharge of a bankrupt merely had the effect of discharging him from liability for debts existing at the time of presenting his petition, leaving him liable for those which might arise in future, even when called into being by contracts made before the delivery to him of his certificate.⁶

§ 457. As a general rule, *future contingent debts* were not affected by a discharge in bankruptcy, although they grew out of contracts or transactions made before the discharge, on the general principle that the creditor, not being able to come in under the assignment,

left doubtful. *Calvert v. Bradley*, 16 How. 598. The assignment by an assignee of a term of years, of his interest, by way of mortgage as security for a debt, does not divest him of his estate, nor destroy the relation of landlord and tenant between him and his tenant, if the debt for which the term was mortgaged be paid or satisfied previous to the accruing of the rent. *Evertsen v. Sawyer*, 2 Wend. 507.

¹ *Astor v. Hoyt*, *supra*.

² *Holford v. Hatch*, Doug. 184; *Carter v. Warne*, 4 C. & P. 191; *Thomas v. Pemberton*, 7 Taunt. 206; *Morton v. Pinckney*, 8 Bosw. 135.

³ *Bourdillon v. Dalton*, 1 Esp. 238; *Naish v. Tatlock*, 2 H. Bl. 319; *Welch v. Myers*, 4 Camp. 368; *Clarke v. Hume*, Ry. & M. 207; *Bagley v. Freeman*, 1 Hilt. 196. Under a general assignment for the benefit of creditors, the assignees took possession

of the stock of goods in the store, and notified the lessor that they did not intend to accept the lease of the store, but they remained on the premises for thirty-six days, selling out the lessee's stock at private as well as at a public sale, vacating the premises, however, before the next quarter's rent became due; and it was held that such an occupation did not render them liable as assignees of the lease, nor could an action be maintained against them for use and occupation. *Journey v. Brackley*, 1 Hilt. 447; *Lewis v. Burr*, 8 Bosw. 140. But see *Horwitz v. Davis*, 16 Md. 313.

⁴ *Hendricks v. Judah*, 2 Caines, 25; *Sparhawk v. Broome*, 6 Binn. 256; *Copeland v. Stephens*, 1 B. & A. 593.

⁵ *Murray v. De Rottenham*, 6 Johns. Ch. 62; *Stinemets v. Ainslie*, 4 Den. 573.

⁶ *Thompson v. Hewitt*, 6 Hill, 254; *Hall v. Fowler*, *ib.* 680; *Auriol v. Mills*, 4 T. R. 94.

should not be deprived of his remedy against his debtor.¹ But the rule now seems rather to depend upon the provisions of each particular bankrupt law enacted. When provisions are introduced, to enable the creditor on the one hand to prove future and contingent claims at a valuation, and on the other to make the certificate a bar to a future suit on such claims, both the express and implied covenants of the bankrupt may be discharged, whether contained in a lease under seal, or any other instrument. Neither the former bankrupt laws of England or America contained provisions of this nature; but more recent enactments have enabled the creditor to come in for such a dividend, and discharged the bankrupt from all claims existing at the period of bankruptcy, whether due or to become due. Independent of such a provision, the creditor would not be barred of any of his rights, for the recovery of rent accruing subsequent to a discharge, except where, in the absence of an express covenant, there has been an assignment and acceptance by the assignee. But, in cases of an express covenant to pay rent, the prior discharge of the lessee, as an insolvent, cannot be resorted to by him as a protection against the claim of the lessor.² When the assignee accepts the lease, the discharge of the bankrupt is complete; and if he afterwards comes in as the assignee of his own assignee, he will incur no greater liabilities than any other person would in the same character.³ And there can be no apportionment of rent, so as to make the bankrupt liable for what accrued previous to the bankruptcy.⁴

§ 458. Trustees under an assignment *for the benefit of creditors* are entitled to a reasonable time to ascertain whether property, held under a lease by the debtor, can be made available for the benefit of the creditors or not; they may, therefore, offer it for sale, and make an experiment to see if the lease be beneficial for the estate without incurring liability.⁵ But, in general, if they act in such a way as to render the premises of less value to the lessor,

¹ Buel v. Gordon, 6 Johns. 126; Mechanics' Bank v. Capron, 15 id. 467. A discharge in bankruptcy, since it reaches all debts which were, or might have been, proved under the commission, discharges a covenant to pay off encumbrances on land before conveyed; but does not discharge personal covenants in a trust deed for uncertain future payments, intended only to protect the trust estate, as future taxes. Murray v. De Rottenham, *supra*. But a covenant for quiet enjoyment is dis-

charged by a certificate of bankruptcy, though the breach happens after the petition is filed, since the claim on the covenant before breach was a contingent demand, provable under the act. *Jemison v. Blowers*, 5 Barb. 686.

² *Lansing v. Prendergast*, 9 Johns. 128; *Hamilton v. Atherton*, 1 Ashm. 67.

³ *Doe v. Smith*, 5 Taunt. 795.

⁴ *Slack v. Sharpe*, 8 Ad. & E. 366.

⁵ *Hastings v. Wilson*, 1 Holt, 290.

or deal with the property as if the lease were vested in them, they will, by such conduct, make themselves personally liable for the payment of rent, and the performance of covenants.¹ An action for use and occupation cannot, therefore, be maintained by the lessor of a tenancy from year to year, against trustees under a deed of assignment for the benefit of creditors, upon an occupation by them, for the purpose of disposing of the insolvent's property, nor unless they have actually occupied the premises beneficially as tenants.² But in a case where the assignees of a bankrupt put up leased premises at auction, and found a purchaser, and received a deposit, but the contract of sale afterwards went off, without the assignees showing any reason why they did not enforce it; it was held, that, by so doing, they had sufficiently elected to take the estate and interest in the premises out of the bankrupt.³ Until some act, however, has been done, by the assignees of the bankrupt, signifying their election to accept the lease, the term remains in the bankrupt.⁴ If the assignees refuse to accept the lease, and deliver up the deed, it amounts to a determination of the term; and, after having accepted the lease, they may rid themselves of future claims for rent by assigning over, as other assignees may.⁵

§ 459. *Executors and administrators* may sue upon breaches of covenant relating to the realty, where such breaches have occurred in the lifetime of the testator, and have diminished his personal estate.⁶ They may, also, sue on covenants in an under-lease, carved out of a leasehold interest; for wherever a person, having a term of years only, grants an under-lease, he is represented, as regards the covenants therein, by his executors; and whether the breaches are incurred during the lessor's life, or since his death, they are the only persons who can recover damages from the covenantor for non-performance.⁷ Or if a lessee demises for a longer period than his own term, his executor may maintain an action for rent accruing since his decease, upon the privity of contract, though there be no privity of estate.⁸ As an executor or administrator may charge others for any debt or duty due the deceased, so will

¹ *Carter v. Warne*, 4 C. & P. 191; *Turner v. Richardson*, 7 East, 335. A release of an undertenant by the assignees in bankruptcy does not amount to an acceptance of the lease. *Hill v. Dobie*, 8 Taunt. 325.

² *How v. Kennett*, 3 Ad. & E. 659.

³ *Hastings v. Wilson*, *supra*.

⁴ *Briggs v. Sowry*, 8 M. & W. 729;

Copeland v. Stephens, 1 B. & A. 593; *Bourdillon v. Dalton*, 1 Esp. 238.

⁵ *Ex parte Nixon*, 1 Rose, 445.

⁶ *Orme v. Broughton*, 4 Moore & S. 417; *Knights v. Quarles*, 4 Moore, 582.

⁷ *Platt on Covenants*; *Mackay v. Mackreth*, 2 Chit. 461; and see *Van Rensselaer v. Hayes*, 5 Den. 477.

⁸ *Baker v. Gostling*, 1 Bing. N. C. 19.

he be chargeable by them for any debt or obligation due from the deceased, and which he might have been charged with during his lifetime, so far as there are assets of the estate with which to discharge the same. The executor is, therefore, chargeable with rent in arrear at the time of the testator's death; and if his testator had assigned the lease during his lifetime, he is chargeable with the arrearages due before such assignment, but not for those accruing after.¹ But if the executor of a tenant from year to year omits to terminate the tenancy, and continues to occupy the premises from year to year, he is liable personally, as well as in his representative capacity, for the rent accruing during his occupancy.² The situation of a receiver is analogous to that of an executor; he cannot be charged as the assignee of a lease, if he waives the term, the income of which is not sufficient to pay the rent.³

§ 460. As a general rule, if a man enters into a covenant running with the land, as to build a house, for quiet enjoyment, or the like, and says nothing about his executors or administrators, yet are they bound to the performance of these things after his death, by reason of their privity of estate.⁴ But the rule is otherwise, when the contract is of a nature entirely personal to the testator or intestate, or intended to be performed by himself alone, and not to bind his representatives. As if a lessee covenants to repair, omitting other words, he is only bound to repair during his lifetime, and his executor or administrator is not bound.⁵ Or if a lessor covenants for himself to discharge the lessee of all quit-rents, he only is bound during life. But, in such cases, if the words, "during the term," are added, the executor or administrator will be chargeable so long as the term lasts.⁶

§ 461. Although an executor or administrator may be liable on the covenants of a lease, he may, at any time, *discharge himself from individual liability*, by assigning over; for, like every other

¹ Shep. Touch. 178, 488; Wentworth v. Cock, 2 P. & D. 251; Lyddall v. Dunlap, 1 Wils. 4; Hyde v. Skinner, 2 P. Wms. 196.

² Wollaston v. Hakewill, 8 M. & G. 297; Remnant v. Bremridge, 8 Taunt. 191. An executor is considered assignee of a term demised to his testator from the time of probate, though he does not enter; but an administrator only assumes the liabilities of an assignee when he takes possession of the demised premises. Pugsley v. Aikin, 11 N. Y. 494.

³ Martin v. Black, 9 Paige, 641; Copeland v. Stephens, 1 B. & A. 598; Wheeler v. Bramah, 3 Camp. 840.

⁴ Tremeere v. Morison, 1 Bing. N. C. 89; Reid v. Tenterden, 4 Tyrw. 111; Dyer, 14; Shep. Touch. 178.

⁵ *Ib.*; Hyde v. Dean of Windsor, Cro. El. 553; Bally v. Wells, 8 Wils. 29; Coffin v. Talman, 8 N. Y. 465.

⁶ Marshall v. Broadhurst, 1 Cr. & J. 408; and see Van Rensselaer v. Platner, 2 Johns. Cas. 17. And as to covenants running with the land, see further, *ante*, § 260.

assignee, he is only personally liable for breaches of covenant happening during his own time, and not for such as were committed by those who preceded him in the enjoyment of the estate. But, if he underlets, the occupation of the under-tenant is his occupation, and he becomes personally liable as assignee of the lease.¹ After entry he may be charged for a breach, either in his representative character or as assignee. If declared against as assignee, he is chargeable as a tenant in actual possession, and the judgment is *de bonis propriis*. But in no case is he chargeable beyond the value of the land; and if the rent reserved be of greater value than the land, the rent will be apportioned, and he will be liable only for so much of the rent as the premises are worth.² If, however, the action is brought against him as executor or administrator, the judgment will be *de bonis testatoris*, even where the breach has been committed in his own time; for it is the testator's covenant which binds the executor, and as representing him.³

§ 462. *The responsibility of an heir* differs in some respects from that of an executor; for he is only chargeable on his ancestor's covenant when the terms of the covenant specially provide for its performance by the heir, and assets descend to him from the covenantor to answer the claim;⁴ unless he has actually taken possession of the land, and then he may be charged as assignee.⁵ He is not liable, generally, on a covenant arising merely by implication of law, as on a lease, with a reservation of rent on the words *yielding and paying*;⁶ but if the heir of the lessor ousts the termor, he is entitled to an action against such heir, by reason of the privity of estate, upon the implied covenant of the ancestor, that the lessee shall enjoy the term.⁷

¹ Bull v. Sibbs, 8 T. R. 327; Hornidge v. Wilson, 11 Ad. & E. 645; Dean of Bristol v. Guyse, 1 Saund. 112; Carter v. Hammet, 18 Barb. 608. It is to be understood that the estate of a testator who was a lessee remains liable for rent in due course of administration, if the landlord refuses to enter. Martin v. Black, *supra*; Copeland v. Stephens, 1 B. & A. 598.

² Matter of Galloway, 21 Wend. 82; Fisher v. Fisher, 1 Bradf. 385; Norton v. Vultee, 1 Hall, 384; Rubery v. Stevens, 4 B. & Ad. 241; Hornidge v. Wilson, *supra*. The case of Williams v. Bosanquet, 1 Brod. & B. 288, having established the doctrine that an assignment is complete without entry by the assignee, it was held,

in Wollaston v. Hakewill, 8 Scott, N. R. 598, that the proper plea for an executor, charged as assignee, was not to traverse the assignment, but to allege that he was not otherwise assignee than by being executor, and that he had never entered.

³ Bull. N. P. 159; Buckley v. Pirk, 1 Salk. 317; Jevens v. Harridge, 1 Wms. Saund. 1 n.

⁴ Gifford v. Young, 1 Lutw. 287; Shep. Touch. 178, 363; Co. Lit. 374, b; Dyke v. Sweeting, Willes, 586; Barber v. Fox, 2 Saund. 136; Derisley v. Custance, 4 T. R. 75; Plasket v. Beeby, 4 East, 492.

⁵ Derisley v. Custance, *supra*; Denham v. Stevenson, 1 Salk. 355.

⁶ Newton v. Osborn, Sty. 387.

⁷ Swan v. Stransham, Dyer, 257 a.

§ 463. The heir of the lessee, as such, can have no claim to the demised premises, unless the lease be dependent upon the life of another, and granted to the lessee and his heirs. The heir will then take as special occupant, and enjoy the same benefits and remedies as a party taking by assignment from the ancestor; the term, however, will be chargeable in his hands, as assets by descent, as in case of lands in fee-simple; and he will, of course, be subject to the same liabilities, in respect to the tenancy, as any other person who had taken the premises by assignment from his ancestor. So a person taking a term under the lessee will stand in the same situation, in point of right and remedy, as any other assignee; and, in respect of the tenancy, he is subject to the same liabilities as other assignees. But a further consideration of the liability of an heir or devisee, to the debts and covenants of the ancestor or testator respectively, does not properly fall within the limits of this work.

CHAPTER XI.

THE MODES OF DETERMINING A TENANCY.

§ 464. HAVING considered the various methods of creating a tenancy, together with the rights and obligations of the respective parties during the continuance of the tenancy, we, in the next place, proceed to show how and when it may be determined. This will be found to result, either from a lapse of the time, or a happening of the event, on which the estate is limited; by means of a notice to quit, when the occupant of the premises holds for no definite period; by a forfeiture, merger, or surrender of the lease; by the termination of the lessor's interest in the premises; or by force of a statute. We propose to discuss each of these topics in its order.

SECTION I.

BY LAPSE OF TIME.

§ 465. Where a lease is for the life of either of the parties, or of some third person, the tenancy will expire upon the decease of him on whose life the lease depends. So upon a lease for life, or for a certain number of years, subject to be defeated by the happening of some particular event, the happening of such event will, *ipso facto*, determine the tenancy.¹ And where the lease is for a definite term of years, independent of any contingency, the tenancy will, of course, expire with the term, by its own limitation, at the last moment of the anniversary of the day from which the tenant was to hold, in the last year of the tenancy.² In all of these cases,

¹ Ludford v. Barber, 1 T. R. 86; Co. Lit. 216; Shep. Touch. 187; Roe v. Ward, 1 H. Bl. 97. The reservation of an absolute power of revocation, in a lease of land, at the will of the lessor, is valid. *Ex parte* Miller, 2 Hill, 418.

² Ackland v. Lutley, 9 Ad. & E. 879. Where there is a proviso in the lease that upon the non-payment of rent by the lessee, the term shall cease, the lessor and

not the lessee has the option of determining the lease upon a breach of the proviso. Reid v. Parsons, 2 Chit. 247. The lease of a farm with chattels, for a certain term, at an entire rent, reserving a power to sell the land during the term, is not terminated, as to the chattels, by a sale of the land. Zule v. Zule, 24 Wend. 76. There was a lease to the defendants, a mercantile firm, for three years, with the privilege of a re-

depending on the express conditions of the lease, no notice to quit will be necessary, in order to dissolve the relation of landlord and tenant; for both parties are apprised of their rights and duties, the lease terminates pursuant to contract, and the lessor may at once enter upon the lessee, and resume the possession of his premises.¹

SECTION II.

BY NOTICE TO QUIT.

§ 466. A tenancy at will may be determined, either expressly or by implication. A determination of the will of the lessor may be implied, at common law, from his exercising any act of ownership inconsistent with the nature of the estate; as if he makes a lease of the land to commence immediately; or if he enters upon the land and cuts timber, makes a feoffment in fee, or does any other act which amounts to an expression of his will.² On the other hand, a desertion of the premises by the lessee, or the doing of any other act inconsistent with his estate, as by assigning over the land to another, or the commission of an act of waste, will terminate it on the part of the tenant. The same result will be produced by the death or outlawry of either party.³ An express determination of a general tenancy at will is produced by a notice to quit; that is, either a formal demand for possession by the lessor, or a formal declaration by the lessee that he will hold no

newal. During the original term, two of the partners retired. The third formed a new firm with another person, and they continued in possession of the premises, paying rent according to the conditions of the lease, for the remainder of that term, and one year afterwards; it was held that such occupation did not renew or continue the original tenancy after the expiration of the term; that the old firm was not bound to make a formal surrender, and that it was for the landlord to know who occupied his premises. *James v. Pope*, 19 N. Y. 324.

¹ *Cobb v. Stokes*, 8 East, 358; *Jackson v. Bradt*, 2 Caines, 169; *Jackson v. Parkhurst*, 5 Johns, 128; *Ellis v. Paige*, 1 Pick. 48; *Bedford v. McElherron*, 2 S. & R. 49; *Clapp v. Paine*, 18 Me. 284.

² Co. Lit. 55, b; 57, a; *Disdale v. Iles*, 2 Lev. 88; *Ball v. Cullimore*, 2 Cr., M. & R. 120.

³ *Ib.*; 5 Co. 116; *Ellis v. Paige*, 1 Pick. 48. A husband and wife were lessees of land during their natural lives, and the life of the longest liver of them, free of rent, and the defendant took possession, under a verbal agreement with them to support them and to receive the profits of the land over what should be necessary for such support; upon the death of the husband it was held that the widow was entitled to recover possession; for the defendant's interest in the lands, under the verbal agreement, terminated on the death of the husband, as that agreement conferred no right which could affect the estate of the wife as survivor. And the defendant on holding over after the husband's death, and without the widow's consent, became a trespasser, and was not entitled to notice to quit. *Torrey v. Torrey*, 14 N. Y. 430.

longer, followed by his giving up possession. If the tenancy is strictly at will, a simple demand is alone requisite.¹ A tenancy at sufferance, however, is determined by mere entry; no demand of possession or other notice being necessary for the purpose.²

§ 467. A tenancy from year to year being for all purposes of notice to quit a general tenancy at will requires a formal notice by landlord or tenant.³ If, after the expiration of a term of years, the tenant continues in possession by consent of his landlord, the law will imply, in the absence of an express agreement, that the parties have renewed the previous agreement for at least another year;⁴ and, therefore, it is both necessary and reasonable, that, if either party should be inclined to change his mind, he should notify the other before the expiration of the next or any following year, of his intention to put an end to the tenancy.⁵

§ 468. With respect to this notice, there are several important particulars to be observed,—as in what cases notice is necessary; when, by whom, and to whom it must be given; its form and direction; how it must be served; and in what cases it is to be considered waived. When a tenant for a year, or any other ascertained period, holds over, no notice is of course necessary, since, without some fresh agreement, express or implied, the tenancy is at an end;⁶ and, therefore, as a general rule, there must be a present existing relation of landlord and tenant, to entitle a party to notice.⁷ But wherever a person has obtained possession of premises belonging to another for some definite period, and the owner, after the expiration of such period, does any act from which it may be inferred that he intends to acknowledge him as his tenant, so as to create a tenancy from year to year, or at will, such as the re-

¹ *Right v. Beard*, 18 East, 210; *Doe v. Stanion*, 1 M. & W. 695, 700; *Jackson v. Miller*, 7 Cow. 747; *Doe v. McKaeg*, 10 B. & C. 721; *Doe v. Wood*, 14 M. & W. 682; *Dunne v. Trustees*, 39 Ill. 578; and see *ante*, §§ 25, and 60.

² *Jackson v. French*, 3 Wend. 337.

³ *Moshier v. Reding*, 3 Fairf. 478; *Bradley v. Covell*, 4 Cow. 349; *Prouty v. Prouty*, 5 How. Pr. R. 81; *Doe v. Ridout*, 5 Taunt. 519. A tenancy from year to year does not depend on continuance of possession. A withdrawal by the tenant without notice to quit does not determine the tenancy. *Pugsley v. Aiken*, 11 N. Y. 494. If a tenant personally receives notice to quit at a particular day without objection, it is an admission that his tenancy expires on that day. *Doe v. Biggs*, 2 Taunt. 109;

Thomas v. Thomas, 2 Camp. 647; *Doe v. Wombwell*, id. 559; *Doe v. Forster*, 18 East, 405.

⁴ *Webber v. Shearman*, 6 Hill, 20; *Digby v. Atkinson*, 4 Camp. 275; *ante*, § 60; *Den v. Adams*, 7 Halst. 99. But in those States where tenancies from year to year do not exist, such holding constitutes a general tenancy at will, governed by the terms of the lease. See *ante*, §§ 57, 60.

⁵ *Morehead v. Watkyns*, 5 Ky. 228.

⁶ *Logan v. Heron*, 8 S. & R. 459; *Cobb v. Stokes*, 8 East, 358; *Doe v. Stratton*, 4 Bing. 446; *Bedford v. McElherron*, 2 S. & R. 49; *Hamit v. Lawrence*, 2 A. K. Marsh. 366; *Allen v. Jaquish*, 21 Wend. 628; *Secor v. Pestana*, 37 Ill. 525.

⁷ *Jackson v. Deyo*, 8 Johns. 422.

ceipt of rent accruing after the expiration of the original tenancy, or the like, the party will be entitled to notice before he can be ejected.¹ So, also, a tenant for years, who holds over so as to create a tenancy from year to year, without any specific act of the landlord, is entitled to notice before he can be ejected; but the holding-over must be continued for such a length of time after the expiration of the term, as to authorize the implication of an assent on the part of the landlord to such continuance. But where the landlord waited three months and twelve days before instituting proceedings, it was held, he was not chargeable with *laches*, especially as it appeared that he had attempted to obtain possession without recourse to coercive measures.²

§ 469. Where one enters under a lease which is void by the statute of frauds; although the receipt of rent will not establish such lease, it will still enure as a tenancy from year to year, for all purposes of a notice to quit.³ The same result ensues where he comes into possession under an agreement for a future lease, or purchase and pays rent; for he then becomes tenant from year to year.⁴ So, also, a tenant who takes possession of more land than he is entitled to by his lease, and pays rent for the whole, is entitled to notice, as to the part not included in the lease.⁵ And where a defendant entered upon land with the owner's permission in his lifetime, made improvements, and remained there fifteen years, without any reservation of rent; it was held equivalent to a tenancy from year to year, and that the heir of the owner must give notice to the tenant before bringing ejectment.⁶

§ 470. But though a tenancy from year to year is like a tenancy at will for the purpose of an express notice to quit, yet it is in other respects a term, and is not like a tenancy at will determined by implication⁷ as by the death or alienation of either party, but notice to quit must be given to the assignee or personal representatives.⁸ But the relation of landlord and tenant does not exist

¹ *Jackson v. Miller*, 7 Cow. 747; *Bedford v. McElherron*, *supra*; *Jackson v. Salmon*, 4 Wend. 827; *Doe v. Brown*, 8 East, 165; *Doe v. Wood*, 2 B. & A. 724.

² *Rowan v. Lytle*, 11 Wend. 616. But the doctrine that mere lapse of time will make a tenant, who holds over his term, at will or from year to year, was merely a *dictum* in this case, and though similar *dicta* occur elsewhere, *Chesley v. Welch*, 37 Me. 106, was expressly overruled in *Edwards v. Hale*, 9 Allen, 462, and see *ante*, § 22, and note.

³ *Schuyler v. Leggett*, 2 Cow. 660; *Doe v. Browne*, *supra*.

⁴ *Thomas v. Wright*, 9 S. & R. 87; *Knight v. Benett*, 8 Bing. 861.

⁵ *Jackson v. Wilsey*, 9 Johns. 267.

⁶ *Den v. Mackay*, 1 Penningt. 420; *Jackson v. Bryan*, 1 Johns. 322; *Chicago, B. & Q. R. R. v. Knox College*, 34 Ill. 195.

⁷ *Ante*, § 57.

⁸ *Doe v. Porter*, 8 T. R. 18; *Rex v. Inhab. of Stone*, 6 *id.* 295.

between the heir or his tenant, and a purchaser under a judicial sale, for the debt of the ancestor; hence, neither of the former is entitled to notice to quit from the latter.¹ But the right to notice to quit is reciprocal, and may be given as well by the tenant as by the landlord.²

§ 471. *Notice to quit is unnecessary* in any case where the relation of landlord and tenant does not exist. Thus where a tenant went into possession after a judgment had been recovered, which was a lien upon the land, notice by the purchaser under the judgment was held to be unnecessary.³ And, if being in possession, he enters into a contract to purchase, but fails to complete his purchase, no demand is necessary; for, by his own act, his interest in the premises has been determined.⁴ So where a man had obtained possession of a house, without the landlord's permission, and afterwards entered into a negotiation for a lease, which failed, the same rule was held applicable.⁵ A person who had held lands upwards of twenty years under an indenture, in which he covenanted to keep possession for the owners, and in which the owners agreed to save him harmless, was considered merely as a bailiff and not a tenant, nor entitled to notice.⁶ So, one who held of a mortgagor, under a parol contract to purchase, was not entitled to notice.⁷ And, although a compensation for the enjoyment of the premises has been received, yet if the relation of landlord and tenant has ceased to exist, notice may be dispensed with.⁸ It seems, however, that a reasonable *demand* of possession is necessary where a party is let into possession under an unqualified agreement for a lease.⁹

§ 472. As a general rule, also, *to entitle a defendant to notice*, there must be some privity, either of contract or of estate, between himself and the lessor; for, where a lessee agreed to sell his lease for a certain sum, indorsed his name on it, and delivered it to the

¹ Jackson v. Robinson, 4 Wend. 486.

² Hall v. Wadsworth, 28 Vt. 410.

³ Den v. Adams, 7 Halst. 99.

⁴ Smith v. Stewart, 6 Johns. 46; Jackson v. Moncrief, 5 Wend. 26; Maynard's Lessee v. Cable, Wright, 18. For a similar reason, a tenant *pur autre vie*, who continues in possession, after the determination of the life-estate, is not entitled to notice. Livingston v. Tanner, 14 N. Y. 64; and see, *ante*, § 25, and note. So it has been intimated that an agreement to pay rent in advance on an oral lease is a condition precedent to the right to occupy; and, on the tenant's failing to pay, no notice to quit is necessary before ejecting him. Elliott v. Stone, 1 Gray, 576. But

see s. c. 12 Cush. 174; and in Bartlett v. Greenleaf, 11 Gray, 98, a similar agreement in a written lease was held not a condition precedent.

⁵ Doe v. Quigley, 2 Camp. 505; Doe v. Boulton, 6 Maule & S. 148.

⁶ Jackson v. Sample, 1 Johns. Cas. 231.

⁷ Jackson v. Stackhouse, 1 Cow. 122.

⁸ Right v. Bawden, 3 East, 260; Roe v. Prideaux, 10 id. 166; Jackson v. Laughhead, 2 Johns. 75. In Illinois, a tenancy at will is terminated by a demand of possession without any notice to quit. Dunne v. Trustees, 39 Ill. 578.

⁹ Jackson v. Rowan, 9 Johns. 330; Same v. Niven, 10 id. 335; Right v. Beard, 18 East, 210; Doe v. Jackson, 1 B. & C. 448.

assignee, who paid him the consideration money, and agreed to pay the rent due and to become due on the lease; it was held to be an agreement for a sale, and that the relation of landlord and tenant did not exist between them, so as to entitle the purchaser to notice.¹ So, if a tenant at will or from year to year disclaims his tenancy by accepting a conveyance in fee from a stranger, attorning to another landlord; or permitting a stranger to take possession of, or exercise acts of ownership over the premises; or is guilty of collusion with such person, to suffer him to take possession in opposition to the landlord from whom he has accepted his lease, the landlord may, in either case, consider him a trespasser, and need not give notice to quit.² But if the acts of the tenant do not amount to a wilful disavowal of the landlord's title, the tenant is entitled to notice; thus, a refusal to pay rent to a devisee, under a contested will, accompanied with a declaration that the tenant was ready to pay the party who should be entitled to receive it, is not of itself a sufficient disclaimer for this purpose.³ Nor is a notice required in any case of adverse possession. As where a person defended an action of ejectment as landlord, and the occupants suffered judgment by default, the defendant was not permitted to object, that the tenants in possession had not received notice to quit from the lessor of the plaintiff, who claimed adversely to the party under whom the tenants occupied.⁴ And where the grantor of a lot of land remained in possession for twenty-seven years, and no act of ownership on the part of the grantee was shown; it was held, that there was no relation of landlord and tenant subsisting between the grantor and those claiming under the grantee, and that the defendant was not entitled to notice to quit.⁵

§ 473. If the landlord accepts another person as tenant, or does any other act which amounts to an assent on his part that there shall be a determination of the tenancy, the necessity of giving notice on the part of the tenant is dispensed with.⁶ As, for instance, where the landlord, in the middle of a quarter, accepted the key of the house, and, according to the lease, it had been agreed that the rent should cease upon the tenant giving up possession, no

¹ *Jackson v. Kingsley*, 17 Johns. 158.

² *Jackson v. Wheeler*, 6 Johns. 272; *Same v. Deyo*, 8 *id.* 422; *Sharpe v. Kelley*, 5 Den. 431; *Meriman's Heirs v. Caldwell's Heirs*, 8 Ky. 82; *Doe v. Grubb*, 10 B. & C. 816; *Doe v. Pittman*, 2 Nev. & M. 678; *post*, § 522.

³ *Tuttle v. Reynolds*, 1 Vt. 80; 8 *id.*

26; *Woodward v. Brown*, 18 Pet. 1; *Jackson v. Wheeler*, *supra*; *Doe v. Frowd*, 4 Bing. 557.

⁴ *Doe v. Creed*, 2 Moore & P. 648.

⁵ *Jackson v. Burton*, 1 Wend. 841; *Jackson v. French*, 8 Wend. 887.

⁶ *Graham v. Anderson*, 8 Harringt. 864; *Sparrow v. Hawkes*, 2 Esp. 504.

notice was required.¹ But in a case where the tenant had quit the premises before the year was out, and neglected to give his landlord notice, and the landlord sued for a whole year's rent, the tenant set up in his defence, that after he quit the premises the landlord put up a bill in the window, and endeavored to let the house; it was held, that such an act on the part of the landlord was only for the benefit of the tenant, and no evidence that the landlord thereby consented, that the tenancy should be put an end to; but that it required other circumstances to be shown, evincing conclusively that such was the landlord's intention.²

§ 474. According to the English law, a *mortgagor in possession*, being only a tenant by sufferance, is not entitled to notice; nor, if he lets a person into possession as tenant from year to year, is such tenant entitled to notice, either from the mortgagee or his assignee; and this, whether the tenant has been let into possession before the assignment or after.³ And the same rule prevails in Massachusetts, Connecticut, Pennsylvania, and North Carolina.⁴ A different rule, however, applied in New York, even previous to the Revised Statutes; for a mortgagor was held entitled to notice before an ejectment, on the ground of privity of estate, and the tenancy at will, which existed by implication; although the rule, it was said, did not apply to the case of an assignee of the mortgagor, because there was no privity between him and the mortgagee.⁵ But the whole doctrine of notice, in mortgage cases, is now entirely superseded in that State by the Revised Statutes; and the action of ejectment itself, by a mortgagee or his assigns, is abolished.⁶

§ 474 a. So a notice to quit may be rendered unnecessary by the terms of the tenancy though at will or from year to year. Thus where a tenant enters under a parol lease for a fixed time which is a tenancy at will by statute;⁷ or under a void lease and becomes a tenant at will or from year to year by retaining possession or paying rent, his time will expire at the period fixed by the demise without a notice to quit.⁸ So where the holding is

¹ Whitehead v. Clifford, 5 Taunt. 518.

² Redpath v. Roberts, 3 Esp. 225; Selw. N. P. 1289.

³ Keech v. Hall, Doug. 22; Thunder v. Belcher, 3 East, 448.

⁴ Groton v. Roxbury, 6 Mass. 50; Rockwell v. Bradley, 2 Conn. 1; Wakeman v. Banks, *ib.* 445; McCall v. Lenox, 9 S. & R. 811; Williams v. Bennett, 4 Ired. 122.

⁵ Jackson v. Hopkins, 18 Johns. 487; Same v. Laughhead, 2 *id.* 75; Same v. Fuller, 4 *id.* 215.

⁶ 2 R. S. 312, § 57.

⁷ Elliott v. Stone, 1 Gray, 574.

⁸ Tress v. Savage, 4 Ellis & B. 86; Doe v. Stratton, 4 Bing. 446; Doe v. Moffatt, 15 Q. B. 257; Berry v. Lindsley, 3 M. & G. 514.

terminated by a conditional limitation;¹ or is to end on lessor's demand.²

§ 475. *As to the time when notice must be given*, the common law requires that, in all cases of a tenancy from year to year, there shall be a notice of at least half a year, not merely six lunar months, but one hundred and eighty-three days,³ or six calendar months, ending with the period of the year at which the tenancy commenced,⁴ before an ejectment can be brought against the tenant. This rule is said, by Chancellor Kent, to prevail in Kentucky, as well as in Tennessee, North Carolina, and Vermont.⁵ In Massachusetts, it was said, the common-law rule of six months has not been adopted,⁶ but that, in all cases of uncertain tenancy, the parties must give to each other reasonable notice of an intention to terminate the estate;⁷ and in one case, a notice of sixty days was held sufficient.⁸ In Pennsylvania, the notice is understood to be one of three months, in all cases; as well without as within the statute of that State, passed in the year 1772.⁹ The Revised Statutes of New York provide, "wherever there is a tenancy at will or by sufferance, created by the tenant, holding over his term, or otherwise, it shall only be terminated by the landlord's giving one month's notice, in writing, to the tenant, requiring him to remove therefrom."¹⁰ And for the purpose of notice, a tenant from year to year is included in the phrase, "tenancy at will," as used in this statute.¹¹ In Michigan, all estates at will may be determined by

¹ Ashley v. Warner, 11 Gray, 48; Creech v. Crockett, 5 Cush. 183.

² People v. Schackno, 48 Barb. 551; Post v. Post, 14 Barb. 258.

³ Gulliver v. Burr, 1 W. Bl. 596; Right v. Darby, 1 T. R. 159. But if a six-months' notice is stipulated for, six lunar months suffice; Rogers v. Dock Co., 84 L. J. Ch. 165.

⁴ Doe v. Porter, 8 T. R. 18; Bessell v. Landsberg, 7 Q. B. 688; Doe v. Watts, 7 T. R. 83.

⁵ 4 Kent, Com. 113; Nichols v. Williams, 8 Cow. 18; Hanchet v. Whitney, 1 Vt. 311; Trousdale v. Darnell, 6 Yerg. 481; Steadman v. McIntosh, 4 Ired. 291. So in New Jersey, Den v. Blair, 3 Green, 181; and Illinois, Hunt v. Morton, 18 Ill. 75.

⁶ Rising v. Stannard, 17 Mass. 237.

⁷ Ellis v. Paige, 2 Pick. 71; Coffin v. Lunt, 2 id. 70. And see Gen. Sts. c. 90, § 31.

⁸ Cutler v. Winsor, 6 Pick. 835. But now, by Gen. Stat. 1860, Ch. 90, §§ 80, 81, all estates at will may be determined by either party, by notice in writing for three

months, or equal to the interval between the rent days; and in cases of neglect or refusal to pay rent due on a written lease, or a lease at will, fourteen days' notice, in writing, to quit, is sufficient.

⁹ Logan v. Herron, 8 S. & R. 458; Hutchinson v. Potter, 11 Pa. St. 472. So by the act of December 14, 1863, amending the act of 1772. Snyder v. Carfrey, 54 Pa. St. 90; Rich v. Keyser, id. 86. The same rule prevails in South Carolina; Godard v. S. C. R. R., 2 Rich. 846; and in New Hampshire; Currier v. Perley, 4 Fost. 219. But when the object is to take proceedings to obtain possession for the non-payment of rent, fifteen days is sufficient in Pennsylvania.

¹⁰ 1 R. S. 745, § 7. Under the Illinois act of 1861, all tenancies for less than a year in duration, and greater than a month, require thirty days' notice to terminate them; for less than a month they do not require such notice, Dunne v. Trustees, 89 Ill. 578.

¹¹ Bradley v. Covel, *supra*. Prouty v. Prouty, 5 How. Pr. R. 81; in an able opinion of Judge Sibley.

either party, by three months' written notice to the other; and when the rent reserved is payable at periods of less than three months, the time of such notice will be sufficient, if it be equal to the interval between the days of payment. And in all cases of neglect or refusal to pay rent, due on a lease at will, fourteen days' notice to quit, given by the landlord, is sufficient, in the latter State, to determine the lease.¹

§ 476. The notice may be given to quit on a particular day; or in general terms, at the end of the current year of the tenancy, which will expire next after the service of the notice.² The latter form of expression is generally used, when the landlord is ignorant of the period when the tenancy commenced; and it is preferable, even when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered. For when a term of years has expired, and a new year has been entered upon, the parties have a right to hold each other to the tenancy for the whole of that year, and the time required for quitting must expire with the current year. And as neither party has a right to put an end to the tenancy before the expiration of the year, if the occupation goes beyond that period, a new year is entered upon, and a right to enjoy it arises.³

§ 477. *But if a particular day is named* in the notice it must be the day of or corresponding to the conclusion of the tenancy, and not to its commencement; for if the latter day is named the possession of the tenant for a new term has begun, and if so, for however short a time, his holding must continue until determined by a new notice.⁴ If even a special agreement is made between

¹ R. S. of Michigan of 1888, 22, 226.

² *Doe v. Butler*, 2 Esp. 589; provided the interval required by law is given. *Snyder v. Carfrey*, 54 Pa. St. 90; *Prescott v. Elm*, 7 Cush. 346; *Currier v. Barker*, 2 Gray, 224, 226.

³ *Sauvage v. Dupuis*, 8 Taunt. 410; *Parker v. Constable*, 3 Wils. 25; *Jackson v. Bryan*, 1 Johns. 322; *Hanchet v. Whitney*, 1 Vt. 311; *Prouty v. Prouty*, *supra*.

⁴ As the proper interval must be allowed, the notice must not be given later than the day corresponding to the rent day or last day of the term. *Bay State Bank v. Kiley*, 14 Gray, 492; *Atkins v. Sleeper*, 7 Allen, 487; *Johnson v. Stewart*, 11 Gray, 181. The cases on this subject have not been clear, nor have they expressly adjudicated this point; but they seem to sustain the doctrine of the text. Notice to determine a tenancy at will has in analogy to the established rule as to similar notice

for tenancies from year to year been required to expire on a rent day. *Prescott v. Elm*, 7 Cush. 344; *Sanford v. Harvey*, 11 Cush. 98; *Hultain v. Munigle*, 6 Allen, 220. But rent day at common law was not the first after the expiring of a term, but the last day of the term; for though rent was not due until the whole term had been enjoyed, it became due at the last minute of the last day, and was payable on that day. *Ackland v. Lutley*, 9 Ad. & E. 879; so *Prescott v. Elm*; *Hultain v. Munigle*, *supra*; and a demand for it had to be made before sundown of that and not a subsequent day. *Duppa v. Mayo*, 1 Saund. 287. The last day, therefore, being rent day was properly named as the time for quitting, as the law does not regard fractions of a day. And the tenant has the whole of that day to quit in, as he has the whole day to pay his rent in; *Doe v. Lea*, 11 East, 312, where on a holding

the parties, empowering them to determine the tenancy by a shorter notice than the one required by law, or obliging them to give one for a longer period, the notice must, nevertheless, expire at the end of the current year of the tenancy, unless some agreement to the contrary is made. Though, if it be not a tenancy from year to year, determinable at a quarter's notice, but a demise "*for one year only, and then to continue tenant, and quit at a quarter's notice,*" the notice may expire at the end, though not in the middle of any quarter.¹

§ 478. When the tenancy is *for a short period*, as for a quarter, a month, or a week, the length of the notice must be regulated by the letting, as a month's notice for a month's letting, and a weekly notice for a weekly letting;² but the same principle governs such a tenancy as regulates a tenancy from year to year; the expiration of the notice must correspond with the expiration of the month or week.³ Therefore, where the premises were taken under an agreement, by which the tenant was to be always subject to quit at three months' notice, it was held by Lord Ellenborough, that a quarter's notice must be given, expiring at the same time of the year at which the term commenced, or at any corresponding quarter-day;⁴ for that justice and good sense required that the notice should accord with the periods of the term. However, if the tenant, at the time of the delivery of the notice, assents to the terms of it, it will waive any irregularity as to the period of its expiration. But the words, "I pay rent enough already, and it is hard to use me thus," do not amount to an acceptance of such a notice.⁵ A

from Michaelmas, a notice to quit on Michaelmas, was considered good, though it was held defective on another ground. Where rent is payable in advance or on credit, as the rent day is no longer the last day of the term, the notice should be to quit on the latter and not on the former day; though in a recent case in Massachusetts, the court held otherwise, under the statute of that State. *Walker v. Sharpe*, 14 Allen, 48.

¹ *Doe v. Donovan*, 1 Taunt. 555; *Kemp v. Derrett*, 3 Camp. 510; *Rex v. Herstonceaux*, 7 B. & C. 551; *Collett v. Curling*, 10 Q. B. 785; and where notice was to be given *at any time* hereafter, it was decided it need not expire at the end of a year, or quarter. *Bridges v. Potts*, 17 C. B. N. S. 814; *Doe v. Grafton*, 18 Q. B. 496. Under the New York statute, the notice need not specify any time at which

the tenant must remove; and at the expiration of a month from the service of notice requiring him to remove — that is, in cases of a tenancy at will, or by sufferance, — the landlord may take proceedings to compel his removal. *Burns v. Bryant*, 81 N. Y. 453. In this case the notice specified a time less than the month required by the statute, but the court held that forasmuch as a specification of time was unnecessary it did not vitiate the notice, but at the expiration of a month from the service of notice, the landlord might re-enter.

² *Doe v. Scott*, 6 Bing. 362; *Sandford v. Harvey*, 11 Cush. 98.

³ *Anderson v. Prindle*, 28 Wend. 616; *Doe v. Hazell*, 1 Esp. 94; *Oakapple v. Copous*, 4 T. R. 361; *Wilson v. Abbot*, 3 B. & C. 88.

⁴ *Kemp v. Derrett*, 3 Camp. 511.

⁵ *Oakapple v. Copous*, *supra*.

tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise; notice must, in that case, be given with reference to the substantial time of entry, that is, to the time of entry on the substantial part of the premises; though the tenant, it is said, will be obliged to quit the particular parts only at the respective times of entry thereon.¹ This substantial time of entry must, in general, be determined by the times when the rent is payable; but it has been held to depend, either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of a jury to determine.²

§ 479. The notice must be in the name of the landlord, though it need not be said that possession shall be delivered up to him.³ When two or more persons are interested in the premises, as *tenants in common*, notice by one, on behalf of himself and his co-tenants, will be valid only so far as his own share is concerned, unless he was acting at the time under the authority of the other parties mentioned in the notice.⁴ And where they are interested as joint tenants, the notice need not be signed by all; but the act of one is supposed to be for the benefit of the others, and is sufficient when acting on their behalf. The lessee holds of all, so long as he and all shall please; and, as soon as any one of the joint tenants gives notice to quit, he in fact puts an end to the tenancy.⁵ If they have appointed an agent, who gives the notice on behalf of all, under an authority derived from some only of the joint owners, it is sufficient, if the other owners subsequently recognize his authority before the notice operates.⁶ But where joint lessors are

¹ Doe v. Spence, 6 East, 120.

² Doe v. Snowdon, 2 W. Bl. 1224; Doe v. Watkins, 7 East, 551; Doe v. Howard, 11 id. 498.

³ Doe v. Foster, 3 C. B. 215.

⁴ Doe v. Chaplin, 3 Taunt. 120; Right v. Cuthell, 5 East, 491; Doe v. Sybourn, 2 Esp. 677; or unless his act is ratified prior to the operation of the notice; *post*, note 6.

⁵ Doe v. Summersett, 1 B. & Ad. 185; So where the lessors were partners and the notice was in the name of all, authority was presumed. Doe v. Hulme, 2 Mann. & R. 438; and the same rule has been applied in a case where no joint tenancy appeared; Alford v. Vickery, Car. & M. 280; Doe v. Hughes, 7 M. & W. 139; and as tenants in common have as to posses-

sion equal unity with joint tenants, there seems no reason for difference between them as to notice. In Pickard v. Perley, 45 N. H. 188, Doe v. Summersett, was denied to be law, and a notice by less than all the lessors, whether joint tenants or tenants in common, was held defective. The entry of one joint tenant or tenant in common, enures to the benefit of all. Young v. Adams, 14 Ky. 127.

⁶ Doe v. Walters, 10 B. & C. 626; Right v. Cuthell, 5 East, 491; Doe v. Goldwin, 2 Q. B. 148; Pickard v. Perley, *supra*, and the case of Goodtitle v. Woodward, 3 B. & A. 689; Which allowed ratification at any time, is not law. *Ib.* For the principle of agency is that ratification must take place without prejudice to intervening rights. *Ib.*; Story, Agency, § 246.

partners in trade, notice by one, in the name of all, is good, for it will be presumed he had authority from his partners.¹

§ 480. Notice *by an agent* of an agent is not sufficient, without a subsequent recognition by the principal;² nor by a mere agent to receive rents, unless he has authority to let as well as to receive.³ A receiver appointed by the Court of Chancery, with a general authority to let lands from year to year, has also authority to determine such tenancies, by notice to quit; for if he has power to let, he must, necessarily, have the power of determining how long he will let.⁴ So an officer of a corporation may give notice, without an express authority for doing so, if the corporation afterwards adopts the act of its officer.⁵

§ 481. *The notice must be given* to the immediate tenant or his assignee.⁶ A lessor cannot give a valid notice to a sub-lessee, nor an under-tenant to the original landlord, since there is neither privity of contract nor of estate between them.⁷ The landlord's notice to his tenant will enable him to recover the premises against an under-tenant.⁸ It need not be directed to the tenant by name, provided it be personally served upon him;⁹ and, when personally served, a mistake in the Christian name will be of no importance.¹⁰ Where the premises are in possession of two or more, as joint tenants or tenants in common, a written notice addressed to all, and served upon one only, will be good notice; at least it raises a presumption that the notice reached the other tenant in common, although he may live at a distance.¹¹ And when the original tenant has quit the premises, and another taken possession, it will be presumed, in the absence of proof to the contrary, that the latter came in as assignee of the former, though he has never paid rent; and it will, in that case, be sufficient to serve notice upon the assignee.¹² When a corporation is tenant, the notice must be given to the cor-

¹ Doe v. Hulme, 2 Mann. & R. 438.

² Doe v. Robinson, 3 Bing N. C. 677.

³ Doe v. Mizem, 2 Mood. & R. 56.

Where aided by the acknowledgment of an attorney, clear proof that he was the attorney must be given. Doe v. Roe, 1 C. B. 711.

⁴ Wilkinson v. Colley, 5 Burr. 2694; Doe v. Read, 12 East, 57, 61.

⁵ Roe v. Pierce, 2 Camp. 96.

⁶ Doe v. Williams, 6 B. & P. 41.

⁷ Pleasant v. Benson, 14 East, 234; Roe v. Wiggs, 5 B. & P. 330.

⁸ Roe v. Wiggs, *supra*; Cox v. Brain, 3 Taunt. 95; Jackson v. Baker, 10 Johns.

270. And where the original tenant has quit, and another has taken possession, it will be presumed in the absence of any evidence to the contrary, that the latter has come in as assignee of the former, though he has never paid rent; and notice served on such assignee will be good. Doe v. Williams, *supra*; Doe v. Murless, 6 Maule & S. 110.

⁹ Doe v. Wrightman, 4 Esp. 5.

¹⁰ Doe v. Spiller, 6 Esp. 70.

¹¹ Doe v. Watkins, 7 East, 551; Doe v. Crick, 5 Esp. 196.

¹² Doe v. Williams, *supra*; Doe v. Murless, *supra*.

porate name, and served upon its officers; if addressed to the officers, it will be insufficient.¹ If the notice be given by the tenant, it must be given to his immediate landlord, that is, to the person to whom he is bound to pay rent, or his agent, and not to the superior or head landlord. If he makes a mistake as to the period of the tenancy, it will not have the effect of determining the lease, and the tenant himself may take advantage of the defect. Such notice is not good as a notice to quit, nor does it operate as a surrender, inasmuch as it is to take effect *in futuro*.²

§ 482. At common law, the notice might be verbal, unless a written one was made necessary by agreement of the parties. But the statutes referred to require the *landlord's notice to be in writing*; ³ and, therefore, a mere verbal request from the landlord to the tenant to quit, will not put an end to a tenancy, at will or by sufferance.⁴ And as a tenancy from year to year cannot be determined, unless by a legal notice, or a surrender in due form of law, a mere parol license to quit, and the tenant's leaving the premises accordingly, will not determine the tenancy; for this would amount to a surrender, which, under the statute, must be in writing.⁵

§ 483. The notice must be *explicit and positive*; in the words of the statute, it must require the tenant to remove from the premises. It should not, therefore, in any case, give the tenant the option of leaving the premises or not, by entering into a new contract on certain conditions. But a notice, if intelligible, although not accurately worded, is sufficient; thus a notice "to remove, or I shall insist on double rent," has been held good; because the latter evidently refers only to the penalty inflicted by the statute, in case the tenant should continue to hold over. In this case, however, it was said, by Lord Mansfield, that if the notice had contained the option of a new agreement, as for instance, "remove, or else that you agree to pay me double rent," it would not have been sufficient.⁶ And in case there should be an obvious mistake in some part of the notice, but

¹ Doe v. Woodman, 8 East, 228.

² Doe v. Milward, 3 M. & W. 328.

³ *Ante*, § 475.

⁴ Timmins v. Rowlinson, 8 Burr. 1608; Doe v. Crick, 5 Esp. 196; Roe v. Pierce, 2 Camp. 96.

⁵ Mollett v. Brayne, 2 Camp. 103; Thomson v. Wilson, 2 Stark. 379; Grimman v. Legge, 2 Mann. & R. 488. But the law was held otherwise in Farson v. Goodale, 8 Allen, 202; where a parol

license to quit, followed by tenant's actually quitting, was held a waiver of written notice. But an agreement upon an oral letting, that the tenant may quit whenever he pleases, does not dispense with notice. Batchelder v. Batchelder, 2 *id.* 105.

⁶ Doe v. Jackson, Doug. 175; Doe v. Smith, 5 Ad. & E. 350; Elliott v. Stone, 12 Cush. 174; Granger v. Brown, 11 *id.* 191; Currier v. Barker, 2 Gray, 224.

yet, upon the whole, it is so certain and direct as to make it impossible that the person receiving the notice should have been misled by it, it will be good. As, for instance, where the landlord gave his tenant notice in the following form: "I hereby give you notice to remove from the premises which you hold of me, situated in the parish of St. Anne, called *The Waterman's Arms*," when, in fact, the only premises which the tenant held of him were called the "Bricklayer's Arms;" in this case, upon its being shown that there was no sign of the "Waterman's Arms" in the parish of St. Anne, that the tenant held no other premises of the plaintiff but "*The Bricklayer's Arms*," and that, therefore, the tenant could not possibly have been misled by the mistake, the notice was held sufficient.¹ The notice must include all the premises held under the same demise; for a landlord cannot determine the tenancy as to part of the thing demised, and continue it as to the residue.² But where they were described as of a wrong parish, the court, after verdict, held it to be immaterial; as the defendant did not show that he held any other premises of the plaintiff, or that he was misled by the notice.³ And if the tenant misleads the landlord, by giving him wrong information, he will be bound by it; and Lord Kenyon held, in the case referred to, that it made no difference whether the information so given proceeded from mistake or design, as it had equally the effect of leading the landlord into error.⁴

§ 484. According to the English cases, when *personal service cannot be effected*, it will be sufficient if notice is left with the wife, or a servant of the tenant, at his usual place of residence, whether upon the demised premises or elsewhere, and its nature and contents explained at the time.⁵ The Revised Statutes of New York direct, that it "shall be served by delivering the same to the tenant, or to some person of proper age residing on the premises; or, if the tenant cannot be found, and there be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read." — "And, at the expiration of one month from the service of such notice, in the manner above specified, the landlord may re-enter, or maintain his remedy of ejectment, or proceed in any other

¹ Doe v. —, 4 Esp. 185; Doe v. Kightly, 7 T. R. 63; Doe v. Culliford, 4 D. & R. 248.

² Doe v. Archer, 14 East, 245; Doe v. Benson, 4 B. & A. 588.

³ Doe v. Wilkinson, 12 Ad. & E. 748. So Congdon v. Brown, 7 R. I. 19.

⁴ Doe v. Lambly, 2 Esp. 635.

⁵ Jones v. Marsh, 4 T. R. 464; Doe v. Watkins, 7 East, 551; Doe v. Dunbar, Mood. & M. 10; Roe v. Street, 4 N. & M. 42. So in Massachusetts, Blish v. Harlow, 15 Gray, 816.

manner prescribed by law, to remove the tenant, without any further or other notice to quit.¹

§ 485. But the *notice may be waived*; for after the landlord has given notice, and the time has expired, he may do some act which amounts to a waiver of it, and recognizes a new or subsisting tenancy. As if he receives rent as such, which has accrued after the expiration of the notice,² or after that time distrains for rent whenever accrued, his notice will be considered as waived, and the tenancy re-established.³ But it seems that a pending action, for use and occupation, will not invalidate the notice; for the landlord may only recover in his action rent due at the time of the expiration of the notice, although he may claim rent to a later period.⁴ So where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after the expiration of the notice to quit, it will not so operate.⁵ Nor is a promise not to turn the tenant out of the farm, unless it should be sold, given after notice to quit, a waiver.⁶ The mere acceptance of money by a landlord, for occupation subsequent to the time when the tenant ought to have quitted, according to the notice given him for that purpose, or a demand of rent accruing, due subsequent to that time, are neither of them a waiver of such notice on the landlord's part, but matter of evidence only, whence a waiver may or may not, according to circumstances, be inferred. For, in all cases, it is for the jury to determine whether the money paid was received as rent; and whether it amounts to a waiver of notice or not, depends upon the intention of the parties, which is a matter of fact to be left to a jury.⁷

¹ 1 R. S. 745; §§ 8, 9.

² *Goodright v. Cordwent*, 6 T. R. 219; *Collins v. Canty*, 6 Cush. 415. But if the rent accrued before the expiring of the notice, *Kimball v. Rowland*, 6 Gray, 224, or was merely demanded, *Conner v. Jones*, 28 Cal. 59; even if it accrued after such expiring, *Blyth v. Dennet*, 18 C. B. 178, the notice is not waived.

³ *Prindle v. Anderson*, 19 Wend. 891; *Zouch v. Willingale*, 1 H. Bl. 311. The case of *Blyth v. Dennet*, 18 C. B. 178, holds to the contrary, for the reason that in the case of a notice to quit, the tenancy is put an end to, by the agreement of the parties, and, therefore, the determination cannot be waived without the assent of both; drawing a distinction between this case, and that of a forfeiture, where the lease is voidable only at the election of the lessor. So *Dendy v. Nicholl*, 4 C. B. n. s. 876, 881; *Hoff v. Baum*, 21 Cal. 120,

the lessor's acceptance of an offer of larger rent, after the expiring of the notice to quit, though not communicated to the tenant, was held a waiver.

⁴ Per Buller, J., *Birch v. Wright*, 1 T. R. 878; Sel. N. P. 650. So acceptance of after accruing rent is no waiver if lessor has already begun ejectment against tenant. *Doe v. Meux*, 1 C. & P. 346; nor mere delay in ejecting tenant after notice has expired. *Jackson v. Stafford*, 2 Cow. 547; *Boggs v. Black*, 1 Binn. 833; *Conner v. Jones*, 28 Cal. 59; *Babcock v. Albee*, 18 Metc. 273. But otherwise if the tenant is told he need not quit. *Tuttle v. Bean*, *ib.* 275.

⁵ *Doe v. Calvert*, 2 Camp. 387.

⁶ *Whiteacre v. Symonds*, 10 East, 13; *Doe v. Humphreys*, 2 *id.* 237.

⁷ *Doe v. Fritchard*, 5 B. & Ad. 780. But if it merely appears that rent was paid and was taken by lessor under protest, it is a

§ 486. The notice, also, may be waived, *by giving a subsequent notice* to the same effect; because the latter notice is an acknowledgment that the tenancy still subsists, after the expiration of the notice first served.¹ But if it is manifest that the second notice to quit is not intended as a waiver of the first, it will not so operate. As, where a second notice was given after the expiration of the first notice, and after the commencement of an ejectment suit, in which the landlord continued to proceed, notwithstanding his second notice, it was held to be no waiver of the original notice; because it was impossible for the tenant to suppose that the landlord meant to waive a notice, upon the foundation of which he was proceeding to turn him out of the farm. The party giving a subsequent notice may also express his intention that it shall not operate as a waiver of his first notice, and then the first notice will stand good.² So where, after the expiration of a notice to quit, the landlord gave the defendant a fresh notice, that unless he quit in fourteen days, he would be required to pay double rent, Lord Ellenborough held there was no waiver of the first notice.³ A tenant who held under a demise from the 26th day of March, for one year thence next ensuing, and so from year to year, for so long as the landlord and tenant should respectively please, after having held more than a year, gave notice, which was less than six months before the 26th day of March, that he would quit on that day, and the landlord assented to the notice; it was held that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law.⁴

waiver at law, and not a question for the jury, for the lessor's act contradicts and controls his words. *Croft v. Lumley*, 5 Ellis & B. 648, 682; and *Ellis, B. & E.* 1069; where this was determined in the House of Lords by seven judges to three, after most elaborate consideration. So *Dendy v. Nicholl*, 4 C. B. x. s. 876, 879; and the doctrine of *Doe v. Batter, Cowp.* 248, that acceptance of rent as such, which accrues after expiring of notice to quit was no waiver, but only a question for the jury, was overruled; as it had already been shaken by *Goodright v. Cordwent*, 6 T. R. 219.

¹ *Doe v. Palmer*, 16 East, 58.

² *Doe v. Humphreys*, 2 East, 287. In an action, however, for double rent, the defendant was tenant to the plaintiff under a demise for three years, from Whitsuntide, 1781. Two months previously to Whitsuntide, 1784, plaintiff gave him notice to quit at that time. After the expi-

ration of the notice, on 8d June, 1784, the plaintiff gave him another notice to quit at Martinmas following, or pay double rent. It was held, by Lord Mansfield, that the first notice was not waived by the second, for that, when a term is to end on a precise day, there is no occasion for a notice to quit; that here it ended at Whitsuntide; that the meaning of the first notice was, that if the tenant did not quit, the landlord would insist on double rent, and the second notice only expressed what was meant by the first. *Messenger v. Armstrong*, 1 T. R. 58.

³ *Doe v. Steel*, 3 Camp. 117; *Doe v. Inglis*, 3 Taunt. 54.

⁴ *Johnstone v. Huddleston*, 4 B. & C. 922. Where a landlord, about to sell his premises, gave notice to the tenant to quit on the 11th October, 1806, but promised him not to turn him off unless they were sold, and, not being sold until February, 1807, the tenant refused, on demand, to

§ 487. At the expiration of the time specified in the notice, the landlord is in precisely the same situation as he would have been at the end of the year, if the tenancy had been for a year, and he may at once proceed to take possession, or if necessary to commence an action for the recovery of the premises.¹ If, however, he omits to commence proceedings to eject the tenant for any considerable space of time, or if he again collects rent, he must give fresh notice before he can take proceedings; for the expiration of the notice is equivalent to the expiration of a lease, and, after this time, a new tenancy will be considered as having commenced.²

SECTION III.

BY FORFEITURE.

§ 488. The relation of landlord and tenant will also be dissolved, when the tenant incurs a *forfeiture* of his lease, in consequence of the breach of some condition therein contained, and the landlord re-enters upon the premises, or signifies his election to treat the lease as void, if it is so expressed.³ At common law, if a tenant does any act inconsistent with his character as a tenant, — as if he impugns the title of his lessor, affirming by matter of record or otherwise, the fee to be in a stranger, claims a greater estate than he is entitled to, refuses to pay rent and attorns to a stranger unlawfully, or aliens the estate in fee, by any mode of conveyance which has the effect of divesting the estate of the reversioner, as by a feoffment, or other common-law conveyance, — a forfeiture will be incurred, and the landlord may re-enter and resume the possession.⁴ But these grounds of forfeiture implied from acts of disclaimer will be considered under that head later.⁵

§ 489. The forfeiture of a term generally occurs, in consequence of a breach of some stipulation contained in the contract, under

deliver possession; on ejectment, the court held that the promise, which was performed, was no waiver of the notice, nor operated as a license to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore that the tenant, not having delivered up possession on demand, after the sale, was a trespasser from the expiration of the notice to quit. *Whiteacre*

v. Symonds, 10 East, 18; *Doe v. Sayer*, 3 Camp. 8; *Doe v. Miller*, 2 C. & P. 348.

¹ *Doe v. Miller*, *supra*.

² *Rowan v. Lytle*, 11 Wend. 616.

³ *Post*, § 492.

⁴ Co. Lit. 251, b; *Read v. Erington*, Cro. El. 321; *Fenn v. Smart*, 12 East, 444; *Goodright v. Davids*, Cowp. 808; *Commonwealth v. Welcome*, 5 Dane, Abr. 13.

⁵ *Post*, § 522.

which the tenant occupies the demised premises. But the common-law doctrine of forfeiture was founded on strict feudal principles, and is now believed to be, not only inapplicable to the present state of society, but unjust in many respects, for which reasons courts of law are found to be averse to enforcing it. Hence a default in the payment of rent, where there is a covenant for its payment, but no condition in the lease providing for a re-entry in case of such default, does not work a forfeiture of the term. For the same reason, also, a stipulation, giving a power of re-entry to the landlord, is strictly construed; and, in order to enforce it, there must be such a breach shown, as it was the clear and manifest intention of the parties to provide for.¹ Where a lease, therefore, contained a proviso for re-entry, if the tenant should make default in the *performance* of any of the covenants therein; it was held to extend only to affirmative covenants, and not to those of a negative character, for they were not to be performed.² So where a lessee covenanted to pay the rent, and not to assign without leave of the lessor, and there was a proviso for re-entry if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained, on the part of the lessee, should be broken, but there was, in fact, no covenant on the part of the lessee contained in the lease, subsequent to the proviso, and merely one by the lessor that, upon the lessee paying the rent, and performing all the covenants *hereinbefore* contained on his part to be performed, he should quietly enjoy, &c.; the court held, that the lessor could not re-enter upon a breach of the covenant not to assign, for the proviso was restrained, by the word *hereinafter*, to subsequent covenants; and, although there were none, the court would not reject the word.³ And a pro-

¹ *Baxter v. Lansing*, 7 Paige, 350; *Brown's Adm'r v. Bragg*, 22 Ind. 122; *Doe v. Bond*, 5 B. & C. 855; *Clark v. Jones*, 1 Den. 516. An interpretation which creates a forfeiture is not to be favored. *Jackson v. Topping*, 1 Wend. 388; and statutes creating penalties and forfeitures are to receive a strict construction. *Hasbrook v. Paddock*, 1 Barb. 685. Equity does not assist the recovery of a penalty or forfeiture, or any thing in the nature of a forfeiture. *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Linden v. Hepburn*, 3 Sandf. 668. But where by the terms of a statute, a forfeiture is to attach, upon the commission of some illegal act, the title of the owner of the property is from that time wholly devested. *Wilkins v. Despard*, 5 T. R. 112; *U. S. v. Grundy*, 8 Cranch, 337;

Fontaine v. Phoenix Ins. Co., 11 Johns. 298; *Bennett v. Am. Art Union*, 5 Sandf. 614.

² *Doe v. Marchetti*, 1 B. & Ad. 715. But a covenant not to underlet, on penalty of forfeiture and damages, was held to intend a forfeiture of the term and estate. *Lynde v. Hough*, 27 Barb. 415; *Co. Lit.* 204, a.

³ *Doe v. Godwin*, 4 Maule & S. 265. Where a lease provides that if the rent be not paid at the day appointed, it may be recovered in an action of debt, the language used precludes the idea of a forfeiture. *De Lancy v. Ganong*, 9 N. Y. 9. So *Burnes v. McCubbin*, 8 Kansas, 221; a proviso of forfeiture on non-payment of rent or taxes as covenanted, does not extend by implication to a further covenant not to assign without permission.

viso, that the lessee shall not "do, or cause to be done, any act, matter, or thing, contrary to and in breach of any of the covenants," has been held not to apply to a breach of a covenant to repair: the omission to repair not being an act done within the meaning of the proviso.¹ So, also, a deposit of a lease with another, as security for money advanced, is not a forfeiture under a condition not to assign.² But insolvency is a voluntary act, and creates a forfeiture under such a condition, although bankruptcy does not.³

§ 490. Where a right of re-entry is reserved, *in case the lessee commits waste*, it is generally construed to mean such waste as will be injurious to the reversion, and not merely such as might be given in evidence under the old writ of waste, unless there be some stipulation in the lease to the contrary. And where a lease contained a proviso for re-entry, if the lessee should commit waste to the value of ten shillings, and the lessee having pulled down some old buildings of more than that value, and substituted others of a different description, the lessor brought his action of ejectment for a forfeiture; it was held, that the waste contemplated by the proviso was waste producing an injury to the reversion, and that it was a question for a jury, under all the circumstances, whether such an injury, to the value of ten shillings, had been committed.⁴ It has been held, also, in New York, that the whole of the demised property is not forfeited under such circumstances, but only so much thereof as waste may have been committed upon.⁵

§ 491. A condition being indivisible, the conditions of a lease do not become severed by a severance in the occupation of the demised premises, and by a payment of rent to the lessor by the respective occupants, for the portion occupied by each. Hence, if either a lessee, or an assignee of a portion of the premises, commits any act which, by the terms of the lease, creates a forfeiture of the estate, the forfeiture attaches to the whole of the premises embraced in the lease. As where a lease contained a covenant, on the part of the lessee, that he would not cut or destroy any part of the timber and wood growing on the demised premises, except for making or

¹ Doe v. Stevens, 3 B. & Ad. 299. A New York statute provides that a diversion of the salt-works, which are farmed out by the State, to other purposes than the manufacture of salt, shall work a forfeiture of the leasehold estate; and upon this statute it has been decided that the diversion to cause a forfeiture must be a

diversion of the whole, and that building a dwelling-house on a portion of the premises would not cause a forfeiture. Hasbrook v. Paddock, *supra*.

² Doe v. Hogg, 4 D. & R. 226.

³ Shee v. Hale, 18 Ves. 404.

⁴ Doe v. Bond, 5 B. & C. 855.

⁵ Jackson v. Tibbitts, 3 Wend. 341.

repairing buildings to be erected on the land, and for necessary fencing, and fuel for one dwelling-house, with a clause of re-entry by the lessor, for a breach of any of the covenants by the lessee; and it was proved, in an action of ejectment brought by the lessor against the lessee, that the latter had cut trees and timbers for purposes not authorized by the lease; it was held that the lessee could not escape the consequences of the forfeiture incurred by such act, on the ground that he had procured his firewood and fencing-timber from other land, and that he had not withdrawn from the demised premises more wood than the lease authorized him to take, although he had used it for other purposes.¹

§ 492. Not only may the lessor re-enter for a forfeiture, but his heir or executor may also re-enter, when entitled to the reversion; and we have seen when an assignee of the reversion may enter for a condition broken. But it is entirely optional with the lessor whether he will avail himself of this right of re-entry or not, although, by the terms of the proviso, the term is to cease, or become void, for the non-performance of the covenants; and if the lessor does not avail himself of it, the term will continue, for the lessee cannot elect that it shall cease or be void.² There was, however, a distinction formerly drawn between leases that were declared to be void upon a breach of condition, and such as were to be voidable only. In the case of a lease for lives, if the lessee was guilty of any breach of the condition, the lease was only voidable, although, by its express terms, it was to become thereby absolutely void; and the landlord might waive his right to re-enter, by the acceptance of rent, or of some other act, which amounted to a dispensation of the forfeiture. But, upon the breach of such a condition in a lease for years, the lease became *ipso facto* void, and no subsequent recognition could set it up again. Yet if the condition, in such case, was merely that the lessor might re-enter, the lease was voidable only, and might be affirmed by an acceptance of rent, if the lessor had notice of the breach at the time.³ But the force of this distinction has been almost, if not quite, abated by the modern decisions, which establish that the effect of a

¹ *Clarke v. Cummings*, 5 Barb. 389; *Jackson v. Brownson*, 7 Johns. 227. An estate is forfeited for the non-performance of a condition by a grantee, though the grantee was under disability, as, for example, a married woman. *Garrett v. Scouten*, 8 Den. 384; 4 Kent, Com. 125; Co. Lit. 246, b.

² *Arnaby v. Woodward*, 6 B. & C. 519; *Rede v. Farr*, 6 Maule & S. 121.

³ *Jackson v. Andrew*, 18 Johns. 481; Co. Lit. 215, a; *Pennant's case*, 8 Co. 64, a; *Duppa v. Mayo*, 1 Saund. 287, b; *Chalker v. Chalker*, 1 Conn. 79.

condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege.¹ The English law in this respect has been generally followed in this country, and such a lease is good until avoided, though the lessee is estopped to set it up against the lessor.²

§ 493. At common law, when a forfeiture was sought to be enforced *for the non-payment of rent*, there was no distinction made between cases where there was a sufficient distress upon the premises, and where there was not. In every case, before a landlord could enter for the non-payment of rent, he must have made a formal demand of the precise *sum due* for the last current quarter, and if the demand included any portion of the rent of a previous quarter, it would have been bad.³ It must also have been made on the day it became due or legally demandable;⁴ at a convenient time before sunset;⁵ at the place where, by the terms of the lease, it was made payable; or, if there be no place mentioned in the lease, at the most notorious place upon the demised premises, which, if there be a dwelling-house, is the front door.⁶ But the

¹ *Doe v. Banks*, 4 B. & A. 401; *Roberts v. Davey*, 4 B. & Ad. 664; *Arnsby v. Woodward*, *supra*; *Doe v. Birch*, 1 M. & W. 402.

² The old law is followed in Pennsylvania. *Kenrick v. Smith*, 7 W. & S. 41; *Davis v. Moss*, 38 Pa. St. 346, 353; and in some cases in New York, see per Paige, J., *Parmelee v. Oswego & S. R. R.*, 6 N. Y. 74, 80; followed by *Garner v. Hannah*, 6 Duer, 262; *Beach v. Nixon*, 9 N. Y. 85. But the law, even in New York, seems well settled in accordance with the text; *Clark v. Jones*, 1 Den. 516; *Ludlow v. N. Y. & H. R. R.* 12 Barb. 440; *Phelps v. Chesson*, 12 Ired. 194; *Cartwright v. Gardner*, 5 Cush. 281; *Bowman v. Foot*, 29 Conn. 331; *Dermott v. Wallace*, 1 Wall. U. S. 64, 65.

The doctrine is sometimes stated that the lease is void as to the lessee, but voidable as to the lessor, which is objectionable as likely to mislead. *Clark v. Jones*, *supra*. If it were void, the lessee would have no title against any one; but the contrary was determined in *Roberts v. Davey*, *supra*. So in *Blyth v. Dennet*, 13 C. B. 178, 180, it is said, by Maule, J.: "In case of a forfeiture, the estate continues, though voidable." So *Woodfall, Landl. & T.* (9th ed.) 286, 664; 1 *Smith, Lead. Ca.* 90. The lease is, therefore, void only if the lessor so declares; the lessee being merely estopped to set it up. Of

course, where the proviso is that the lease shall be void and the lessor re-enter, it is only voidable by re-entry. *Doe v. Birch*, 1 M. & W. 402; *Dakin v. Cope*, 2 Russ. 170; *Hayne v. Cummings*, 16 C. B. n. s. 421; *Garnhart v. Finney*, 40 Mo. 449, 460.

³ *Doe v. Paul*, 8 C. & P. 613; *Van Rensselaer v. Jewett*, 2 N. Y. 147.

⁴ Although the lease contains a proviso that the lessor may re-enter, if the rent remains unpaid for twenty-eight days after quarter-day; for the proviso for recovery by prosecution, distress, or re-entry for want of distress, does not extend the time of payment. *Van Rensselaer v. Jewett*, *supra*.

⁵ *Jackson v. Harrison*, 17 Johns. 66; *Duppa v. Mayo*, 1 Saund. 287. For the very primitive reason that the tenant may have light to count the money.

⁶ *Connor v. Bradley*, 1 How. U. S. 211; *Van Rensselaer v. Snyder*, 9 Barb. 302; s. c. 13 N. Y. 299. Co. Lit. 202, a; *Clun's Case*, 10 Co. 129, a; *Smith & Bustard's case*, 1 Leon. 141; *Fabian v. Winston*, Cro. El. 209; *Duppa v. Mayo*, *supra*. And there must be such a demand on the premises, even where the rent is payable at another place than the premises. *Van Rensselaer v. Jewett*, *supra*; *Boroughe's case*, 4 Co. 78, a. In respect to service reserved, if the lease does not fix any place of performance, it is not necessarily upon the demised premises, but the landlord may

lessee might seek the lessor at any time during the natural day, that is, before twelve at night on which the rent becomes due, and make a personal tender of the rent, in order to save the forfeiture.¹ If the rent was payable at any specified place, the tender must be made at that place;² but if no place was mentioned, it was enough that the lessee be upon the land with the money, or the specific articles (if the rent be payable in kind), ready to pay if demanded.³

§ 494. The same strict proof of demand is still required of a landlord who *re-enters for a forfeiture*, where there are sufficient goods upon the demised premises, from which he might have realized his rent by a distress, if he had thought proper; or where the relation of landlord and tenant subsists by mere operation of law, and the statute authorizing summary proceedings to take possession after the non-payment of rent cannot be resorted to.⁴ But the statutes of some of the States have substituted the service of a declaration in ejectment for a formal demand of rent, in cases where a half-year's rent is due, and no sufficient distress can be found upon the premises to satisfy the rent.⁵ And a recent statute of New York, abolishing distress for rent, not only dispenses with the formality of a demand, but gives a right of re-entry, in cases of forfeiture for the non-payment of rent, after the service of fifteen days' notice to quit, in writing upon the tenant, whether there be

designate any reasonable place. *Van Rensselaer v. Jones*, 5 Den. 449. Connecticut does not dispense with the requirements of the common-law demand. *Bowman v. Foot*, *supra*. Nor Ohio. *Smith v. Whitbeck*, 18 Ohio St. 471. Nor Kentucky. *Proctor v. Keith*, 12 Ky. 252. Nor California. *Gaskill v. Trainer*, 8 Cal. 884. Louisiana does. *Hyde v. Palmer*, 12 La. 859.

¹ *Burrough v. Taylor*, Cro. El. 462.

² *Lush v. Druce*, 4 Wend. 818; *Remsen v. Conklin*, 18 Johns. 450. A waiver of a demand will never be implied to aid a forfeiture. *Gaskill v. Trainer*, *supra*.

³ 16 Johns. 222; 8 Kent, Com. 468. In order to obviate some of these difficulties, the parties sometimes inserted in the condition of the lease, terms expressly dispensing with a formal demand of the rent, and such dispensation was held operative. *Doe v. Masters*, 2 B. & C. 490. Thus where the stipulation was that the lease should end without further notice or demand, it was held that no demand was necessary. *Fifty Associates v. Howland*, 5 Cush. 214.

⁴ It is essential to these proceedings that no sufficient distress be found on the premises. *Doe v. Fuchau*, 15 East, 286. Every part of the premises should be searched. *Powell v. King*, in *Smith v. Doe*, 2 Brod. & B. 514. The goods, however, must be so visibly on the premises, that a broker, going to distrain, and using reasonable diligence, would find them. *Doe v. Franks*, 2 Car. & K. 678. The statutes speak of no sufficient distress being found on the premises; if, therefore, the tenant locks up his doors, so that the landlord cannot enter upon the premises to distrain, proof of this fact is enough, without showing that no sufficient distress was on the premises. *Doe v. Dyson*, Mood. & M. 77. And it was at one time thought that where more than half a year's rent was due, it was not enough to show that there was no distress sufficient to satisfy the whole arrears due. *Doe v. Roe*, 9 Dowl. 548. But this has since been held not to be the true construction of the statute. *Cross v. Jordan*, 8 Exch. 149.

⁵ 2 R. S. 505, § 80; 4 Geo. II. c. 28.

sufficient goods upon the premises or not.¹ It is to be observed, however, that this right of re-entry, constituting a forfeiture for the non-payment of rent, cannot exist except where it is expressly so stipulated in the lease.²

§ 495. When a tenant has forfeited his lease, by a breach of the covenant for the payment of rent, courts, both of law and equity, consider the clause of re-entry to be mainly inserted for the landlord's security, and will interfere in the tenant's behalf, although all the formalities of a common-law demand may have been complied with, upon his satisfying the rent due, and any damages which the landlord may have sustained in consequence of this omission.³ And, in general, a court of equity will relieve the tenant from a forfeiture, where the breach has been accidental, or where it has been incurred by neglecting to pay a sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant's withholding the payment.⁴ The Revised Statutes of New York also secure a remedy to the tenant, in cases of forfeiture for the non-payment of rent, by permitting him, at any time within six months after a landlord obtains possession of the premises, in an action of ejectment, to tender to the lessor, or his attorney, the rent due, with costs, and all further proceedings are then to cease; the premises are to be forthwith redelivered to the lessee, who will hold the same without any new lease, and according to the terms of the original demise. But if no such tender is made within the six months, the lessee, and all persons deriving title under him, will be barred from all relief in law or equity, and the premises will be thenceforth discharged from the lease.⁵ It would seem, however, that the actual tender or payment of money may, in some cases, be dispensed with; for, in a case where there had been various dealings between a landlord and his tenant, so as

¹ Laws of 1846, ch. 274, p. 389.

² *Van Rensselaer v. Jewett*, *supra*.

³ *Phillips v. Doelittle*, 8 Mod. 345; *Anon.* 1 Wils. 75; *Goodright v. Norright*, 2 W. Bl. 746; *Baxter v. Lansing*, *supra*; *Story's Eq.* § 1314; 10 Ves. 6, 7; 12 *id.* 282, 475; 16 *id.* 406; *Lovat v. Ranelagh*, 8 Ves. & B. 24; *Wilson v. Jones*, 1 Bush, 178. The same power was exercised at law in *Atkins v. Chilson*, 11 Metc. 112.

⁴ *Jackson v. Brownson*, 7 Johns. 235; *Nelson v. Carrington*, 4 Munf. 332; *Bracebridge v. Buckley*, 2 Price, 200. But

courts of equity will not relieve against a forfeiture decreed by the legislature; *Carondelet v. Wolfert*, 39 Mo. 305.

⁵ 2 R. S. 505, § 38. By the New York Code of Procedure, § 452, judgment of forfeiture and eviction shall only be given in favor of a person entitled to the reversion against the tenant in possession when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.

to produce an account too complicated to be taken at law, and the landlord brought an ejectment for the non-payment of rent, and the tenant filed a bill for an account upon those dealings, and to have the balance applied to the liquidation of the rent due, Lord Redesdale held that, upon such a bill, there was no necessity for the tenant to bring the rent into court.¹ But if the question, whether rent be due or not, is not too complex to be tried at law, and there is no occasion for a bill of account, the tenant will not be restored to possession without paying the money into court.²

§ 496. *The doctrine of compensation* will not apply in any case where the landlord's damages are not a mere matter of computation; and, therefore, if it is stipulated in a lease that the lessor shall re-enter, in case the lessee makes an assignment without permission of the landlord, the breach of such an agreement is a cause of forfeiture, against which the court will not grant relief.³ Or if a tenant, being under a covenant to keep the premises insured, neglects to do so, and, by the terms of the lease, such neglect or refusal is to operate as a forfeiture, a court of equity will not interfere; for, as it is impossible to estimate in damages the amount of risk run, by not insuring, the effect of giving relief in such a case would be, that a tenant might break this covenant with impunity, and every landlord must take his tenant for insurer, for want of power to enforce his covenant.⁴ The same principles apply to cases where the tenant neglects to repair;⁵ or has made a way through the premises, contrary to his express covenant;⁶ exercises a forbidden trade;⁷ or cultivates the land in a manner prohibited by the lease.⁸ But courts of equity are only closed against the tenant, where the forfeiture is incurred by his wilful and culpable neglect to fulfil the terms of his covenant; and not in cases where the omission has been occasioned by inevitable accident. And the general rule to be applied to all such cases seems to be, that courts of equity will relieve where the omission, and consequent forfeiture,

¹ O'Connor v. Spaight, 1 Sch. & L. 305; Beasley v. Davey, 2 *id.* 403.

² O'Mahony v. Dickson, 2 Sch. & L. 400.

³ Lovat v. Ranelagh, 3 Ves. & B. 29-81; Sanders v. Pope, 12 Ves. 291; Davies v. Moreton, 2 Ca. in Ch. 127.

⁴ Rolfe v. Harris, 2 Price, 206, n.; Reynolds v. Pitt, 19 Ves. 184; White v. Warner, 2 Mer. 459; Green v. Bridges, 4 Sim. 96; Thomson v. Guyon, 5 *id.* 65. But if the premises are uninsured for a short time, the lessor will not be allowed to enforce a forfeiture, for a breach of this

covenant, if by his own conduct he had induced the lessee to believe the premises had been insured by himself. Doe v. Sutton, 9 C. & P. 706. The strictness of this doctrine is also relaxed in cases where a delay to insure is properly explained, or shown to be reasonable. Doe v. Ulph, 18 Q. B. 204.

⁵ Hill v. Barclay, 16 Ves. 402; s. c. 18 *id.* 56.

⁶ Descarlett v. Dennett, 9 Mod. 22.

⁷ Macher v. Foundl. Hosp. 1 Ves. & B. 188; Wafer v. Mocato, 9 Mod. 112.

⁸ Lovat v. Ranelagh, *supra*.

are the result of mistake or *accident*, and the injury and inconvenience arising from it capable of compensation;¹ but where the transgression is wilful, or the compensation impracticable, they invariably refuse to interfere.²

§ 497. The ordinary *waiver of a forfeiture* occurs by an acceptance of, or distraining for rent, which became due after a breach committed by the tenant.³ And this result follows, without reference to the amount of rent received, or to the sufficiency of the distress.⁴ But, to make it a waiver, it is necessary that the landlord, at the time of accepting the rent, have knowledge of the fact that the condition has been broken.⁵ If, with this knowledge, he receives rent from the tenant, which has accrued subsequent to a breach of the condition, he again consents to and establishes the tenancy, which it was competent for him to have avoided; and thereby precludes himself from taking advantage of the tenant's misconduct.⁶ Thus, if the condition be, that the tenant shall not assign without the written permission of his landlord, and notwithstanding this, he makes an assignment, if the landlord subsequently accepts rent from the assignee, it will be considered a waiver of the forfeiture, and makes the lease valid in the hands of the assignee.⁷ So, also, a forfeiture for not repairing may be waived by the receipt of rent becoming due after a right of re-entry accrued;⁸ but not by receiving rent which accrued before the expiration of a notice to repair; nor is it waived, but merely suspended, by allowing a tenant further time to repair.⁹ Neither will the receipt

¹ *Baxter v. Lansing*, *supra*.

² *Davies v. Moreton*, 2 Ca. in Ch. 127; *Rolfe v. Harris*, *supra*; *Cage v. Russell*, 2 Vent. 352.

³ *Newman v. Rutter*, 8 Watts, 51; *Jackson v. Sheldon*, 5 Cow. 448; *Doe v. Rees*, 4 Bing. N. C. 384; *Doe v. Ward*, 1 Stark. 411; *Doe v. Batten*, Cowp. 247. *Gomber v. Hackett*, 6 Wisc. 323; *Price v. Worwood*, 4 Hurlst. & N. 512. The acceptance of rent, of course, only affirms the tenancy, during that period in respect to which the rent was paid; and therefore the landlord may receive any rent which became due before the alleged forfeiture, or indeed up to the day of such forfeiture, or may bring an action to recover it, without waiving the forfeiture. It is only by receiving or claiming rent due since the forfeiture, that it is waived. See *Pennant's case*, 8 Co. 64, b; *Jackson v. Allen*, 8 Cow. 220; *Hunter v. Osterhoudt*, 11 Barb. 33; *Bleeker v. Smith*, 13 Wend. 530; and the case of *Coon v. Brickett*, 2 N. H. 163, which held a contrary doctrine, is not law.

⁴ *Wilderv. Ewbank*, 21 Wend. 587. In the case of *Bowman v. Foot*, *supra*, it is doubted whether after an entry for the non-payment of rent, the acceptance of rent is a waiver of the forfeiture.

⁵ *Jackson v. Schutz*, 18 Johns. 174; *Jackson v. Brownson*, 7 id. 227; *Jones v. Roberts*, 8 Hen. & M. 436; *Cowp. 803*; *Keeler v. Davis*, 5 Duer, 507. So *Croft v. Lumley*, Ellis, B. & E. 1069; *Garnhart v. Finney*, 40 Mo. 449.

⁶ *Marsh v. Curteys*, Cro. El. 528; *Harvey v. Oswald*, ib. 553, 572; *Goodright v. Davids*, Cowp. 804; *Boggs v. Black*, 1 Binn. 333; *Clarke v. Cummings*, 5 Barb. 339; *Croft v. Lumley*, *supra*, where such waiver was held a legal presumption, resulting from the acceptance of such rent, under protest.

⁷ *Whitchcot v. Fox*, Cro. Jac. 398; *Roe v. Harrison*, 2 T. R. 425.

⁸ *Fryett v. Jeffreys*, 1 Esp. 393.

⁹ *Doe v. Brindley*, 4 B. & Ad. 84; *Doe v. Birch*, 1 M. & W. 408; *Doe v. Meux*, 4 B. & C. 606.

of rent, after a landlord has actually commenced his action of ejectment for the forfeiture, amount to a waiver.¹

§ 498. Other acts of the lessor, besides an acceptance of rent, have been held to waive a forfeiture, when they show an intention on his part that the lease should continue.² Thus a notice to quit at the end of a half-year, given after the happening of a breach, has been held to produce such a result.³ And although a landlord will not lose his right to re-enter by merely lying by, however long the period, and witnessing the act of forfeiture, yet if, with a full knowledge thereof, he permits the tenant to expend money in improvements after a forfeiture has been incurred, it is a circumstance from which the jury may presume a waiver, as well as ground for an application to a court of equity for relief.⁴ Whether a demand of rent, without its being paid by the tenant, is a waiver, may be questionable; but, if such be the case, an agent making the demand must have a general authority to act as agent, or it must be proved that the landlord had notice of the forfeiture.⁵ The landlord's knowledge of unauthorized acts, without interference, will not preclude him on the ground of acquiescence.⁶ And where a lessee covenanted to erect certain houses within twelve months, and the steward of the lessor, after there was a clear ground of forfeiture, allowed the lessee to complete the buildings, the right of re-entry was held not to have been waived.⁷

§ 499. But, *to operate as a waiver*, the landlord must accept rent which has accrued since the forfeiture happened;⁸ for if the condition be, that the landlord may re-enter for non-payment of the rent, or in case the rent be in arrear for a certain space of time, he may, at any time after the day of payment, receive that rent, or bring a

¹ Doe v. Meux, 1 C. & P. 846; Jones v. Carter, 15 M. & W. 718; Dendy v. Nicholl, 4 C. B. n. s. 876; Importers, Ins., Co. v. Christie, 5 Rob. N. Y. 169. In New York it was held that where a landlord elects to proceed at law against a tenant, to enforce a forfeiture of the lease for the non-performance of its conditions, he cannot during the pendency of the suit at law against the tenant, have relief in equity against him as upon a subsisting tenancy. Stuyvesant v. Davis, 9 Paige, 427; Linden v. Hepburn, 3 Sandf. 668.

² Doe v. Meux, 4 B. & C. 606; Doe v. Birch, 1 M. & W. 408. So a negotiation for an extension of a lease where it is spoken of as still subsisting waives. Ward v. Day, 4 Best & S. 837.

³ Doe v. Miller, 2 C. & P. 848.

⁴ Doe v. Allen, 8 Taunt. 78.

⁵ Doe v. Birch, 1 M. & W. 402. A right of entry on the part of the landlord for a forfeiture may be suspended without being waived. And the doctrine that the acceptance of rent after a forfeiture is a waiver thereof, is a question of intent; it being only inferred from the payment and acceptance of rent, that both parties recognize the lease as still subsisting, but the contrary may be shown by express proof. Manice v. Miller, 26 Barb. 41.

⁶ Doe v. Allen, *supra*.

⁷ Doe v. Brindley, 12 Moore, 87.

⁸ Stuyvesant v. Davis, *supra*; Jackson v. Allen, 8 Cow. 220; Bleecker v. Smith, 18 Wend. 580.

suit at law for it, and yet insist upon the forfeiture.¹ If, however, the landlord, after a forfeiture has been incurred, proceeds to make a distress for rent previously due, he thereby affirms the possession of the tenant, and waives his right of re-entering; because he cannot distrain for rent unless the relation of landlord and tenant, and consequently the lease, exists.² And if he brings an ejectment for the forfeiture, he can only recover rent due after the time of the demise laid in his declaration, in the action for mesne profits; for, by bringing an ejectment for the forfeiture, he has chosen to treat the lessee and his sub-tenants as trespassers from that time, and the claim to accruing rents is wholly inconsistent with his proceeding at law to enforce a forfeiture.³

§ 500. Where, however, there is a *continuing cause of forfeiture*, the landlord will not be precluded from taking advantage of it, by receiving rent which accrued after the breach was originally committed. Thus, where the forfeiture was incurred by using two rooms in a house, in a manner prohibited by the lease, such user was held to be a continuing breach, and that the landlord might recover after receiving rent, provided the user continued after such receipt.⁴ Besides this, the act by which the forfeiture was waived must amount to an affirmance of the tenancy, or a recognition of its continuance; it is not enough that the landlord knows of the breach of the condition simply, without availing himself of the right to re-enter. And, therefore, in a case where the tenant had forfeited his lease, by carrying on a trade upon the premises, contrary to the agreement, and the landlord had stood by for six years, and witnessed the act without moving in the matter; the court held that he had not waived the forfeiture by the long lapse of time that had occurred, because there was a continuing cause of forfeiture, and a fresh breach of the condition upon which the tenant held the lease, every day during the term that the for-

¹ *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Arnsby v. Woodward*, 6 B. & C. 519; Co. Lit. 211, b; *Jackson v. Sheldon*, *supra*.

² *Zouch v. Willingale*, 1 H. Bl. 311; *Jackson v. Allen*, *supra*.

³ *Stuyvesant v. Davis*, *supra*.

⁴ *Doe v. Woodbridge*, 9 B. & C. 376. Where a tenant, who is bound to keep the premises insured at all times during the demise, leaves them uninsured for a time, the receipt of rent is only a waiver of that portion of the breach which has occurred at the time the rent is received. See *Doe*

v. Woodbridge, *supra*; *Doe v. Gladwin*, 6 Q. B. 953. In *Doe v. Jones*, 5 Exch. 498, the lessee was bound, under a penalty of forfeiture, to repair the demised premises, and to keep them repaired during the term; he allowed the premises to be out of repair, and afterwards the landlord received rent. The tenant then proceeded to pull down a portion of the buildings and to make excavations, with the intention of repairing. It was held that the lease was forfeited, and that the reasonable time for repairing did not commence afresh after the receipt of the rent.

bidden trade was carried on upon the premises, and there had been no subsequent recognition of the tenancy.¹ Upon the same principle, the Supreme Court of New York have held, where there was a covenant on the part of the lessee that he would plant a certain number of apple-trees upon the farm, and would replace those that should decay or get destroyed, so as always to keep up the given number during the term, that it was a continuing covenant; and, if the landlord should collect rent after he knew there was a breach of such a covenant, it would not waive the forfeiture, or prevent the landlord from re-entering, if, subsequent to the payment of such rent, there should still be a failure, on the part of the tenant, to perform his engagement.²

§ 501. We have seen that if a condition is single it is wholly discharged by one waiver; if continuous, the waiver only discharges the breach. Thus a condition against assigning is of the former kind, and a waiver terminates it like a license.³ A condition against underletting, though not strictly continuous, is yet not a single condition, but is susceptible of more than one breach during the term and a waiver of one will not excuse a second.⁴

SECTION IV.

BY MERGER.

§ 502. *Another means* of dissolving the relation of landlord and tenant is, by an operation of law, denominated a *merger*; which result follows whenever two or more distinct estates in the same lands are found to meet in the same person, without any intermediate estate. As when a tenant for life, or for a term of years purchases the fee, or the fee descends to him as heir-at-law; in either case, the lease is merged in the inheritance, since there would be a

¹ Doe v. Watt, 1 Mann. & R. 694; Doe v. Allen, 3 Taunt. 78. But where the lessee was restrained by a proviso from altering demised premises, and carrying on trade therein, and he changed them to an inn, and so used them with lessor's knowledge for more than twenty years, the court held the jury might presume a license. Gibson v. Doeg, 2 Hurlst. & N. 615.

² Jackson v. Allen, *supra*; Bleecker v. Smith, 13 Wend. 53.

³ Lloyd v. Crispe, 5 Taunt. 249; and see *ante*, § 287.

⁴ Doe v. Bliss, 4 Taunt. 735; per Patteson, J., Doe v. Pritchard, 5 B. & Ad. 781; and so McKildoe v. Darracott, 13 Gratt. 278, though on somewhat different ground.

manifest inconsistency in allowing a person to have two distinct estates, immediately expectant on each other, while one of them includes the time of both, thus uniting the two different characters of landlord and tenant in the same person.¹

§ 503. To merge the two estates, they must come to the same person in one and the same right; and the particular estate, and that in reversion, must be of the same quality: that is, either both legal, or both equitable. And no person can have a term of years in his own right, and a freehold in another right; but his own term must merge in the freehold, although he may have a freehold in his own right, and a term of years in right of another. As if he who has the reversion in fee marries the tenant for years;² or the tenant makes the landlord his executor;³ the term of years is in neither case merged, because, by either operation, he would have the inheritance in his own right, while he would take the term of years in right of his wife, or in his character of executor. But if the case is reversed, and the tenant marry the lessor, or purchase the inheritance when he holds the term as executor, in either event the term of years is swallowed up in the inheritance, or, in the language of the law, is merged.⁴

§ 504. The more remote estate must be the next vested estate in remainder or reversion, without any intervening estate either vested or contingent. A mere right or title will not suffice; and an *interesse termini* not being a vested interest, but resting merely in contract, is no such intervening interest as will prevent the application of the law of merger. Therefore where A. made a lease to B. for

¹ *Roberts v. Jackson*, 1 Wend. 478; *Jackson v. Hull*, 10 Johns. 481; 2 Black. Com. 177. Unless there be two estates in the same person in the same land, there is no estate in that person to occasion a merger. An estate signifies such interest as the tenant hath therein; and a tenant is one who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. See the learned opinion of Mr. Justice Marvin, in *Clift v. White*, 12 N. Y. 526; and the general doctrine of merger discussed in *James v. Johnson*, 6 Johns. Ch. 417; *Van Nest v. Latson*, 19 Barb. 604.

² Co. Lit. 288, b; *James v. Morey*, 2 Cow. 246. A merger as to a portion of the premises, the legal titles to which have become united, may take place *pro tanto*,

although no union takes place as to the residue. *Ib.* *Casey v. Buttolph*, 12 Barb. 637.

³ Bac. Abr. Leases. Where the greater and less estate meet and coincide in the same person, it is admitted that at law, the lesser estate is annihilated. But this rule is not inflexible in equity, for there it depends on the intention of the parties, and a variety of other circumstances, whether a merger shall take place or not. Per Willard, J., in *Reed v. Latson*, 15 Barb. 9.

⁴ *Lee's case*, 3 Leon. 110; Co. Lit. 388, b. The writer acknowledges his obligation to Mr. Preston's practical treatise on Conveyancing, for a large portion of this brief outline of some of the distinctive features of the law of merger.

ten years, to begin presently, and afterwards granted a second lease to C. of the same land, to commence at a future day, and, in the mean time, B. purchased the fee, by which his tenancy was merged; it was held that the second lessee might at once enter and enjoy his term. The first term here merged, notwithstanding the *interesse termini*; and this latter interest only conferred a right of possession upon the second lessee, earlier than it could otherwise have done without the merger.¹ It must be observed, however, that the strict legal doctrines of merger, are not favored in equity; where it is not allowed to take place but for good reason. Nor will it be permitted, where the intention of the parties was manifestly otherwise.² And if there be any beneficial interest to protect, such as those of creditors, legatees, husbands, or wives, or any right or intention to the contrary, the union of the legal and equitable interests in one person will not effect a merger. The same rule applies where the person in whom the two estates unite, is under some disability to make an election, such as is caused by infancy or insanity; or where the lease has been assigned to the lessor as security for a debt.³

§ 505. Mr. Preston, in his treatise on the law of merger, notes a distinction as to the rule, that there will be no merger if the two estates are held in different rights, or the freehold is held by the owner of the fee in his own right, and the term in *autre droit*; which is, that the accession of one estate to another, merely by the *act of law*, as by marriage, descent, executorship, or intestacy, will not occasion a merger, when the two estates are held in different rights; while a descent of the inheritance will merge a term which a person has in his own right, though he be trustee of that term.⁴ And although there will be no merger where either of the two estates, which are held in different rights, is an accession to the other by act of law, yet the lesser estate will merge, as often as one of them is an accession to the other by *the act of the party*, as by

¹ Dyer, 112; Symonds v. Cudmore, 4 Mod. 1; Whitchurch v. Whitchurch, 2 P. Wms. 236.

² Clift v. White, 12 N. Y. 519; James v. Morey, *supra*.

³ Gardner v. Astor, 8 Johns. Ch. 58; Starr v. Ellis, 6 id. 393; Gibson v. Crehore, 8 Pick. 475; Mechanics Bank v. Edwards, 1 Barb. 271; Breese v. Bange, 2 E. D.

Smith, 474. A surrender of a leasehold estate to the reversioner creates a merger, but will never be allowed to defeat the rights of a third party, which have intervened before the merger took effect. Gas-kill v. Turner, 3 Cal. 384.

⁴ 3 Prest. on Conv. 309; Lee's case, 3 Leon. 110; Plowd. 418.

purchase, or the like.¹ This exception is allowed, on the principle, that, as a merger is the sinking of one estate in another by the conclusion of law, the law will not allow it to take place, to the prejudice of creditors, legatees, infants, husbands, or wives.²

§ 506. The estate in reversion or remainder must also be as large, or larger, than the preceding estate. An estate for years may merge in an estate for life, or any other freehold, even if the term be for a thousand years, and although, according to all reasonable calculation from the utmost length of human life, it would certainly continue beyond the duration of any person's life; for, in legal consideration, an estate of freehold is of greater extent, and of higher estimation, than any chattel interest. This rather curious doctrine of the law may, perhaps, be deduced from the dependent state of those who were formerly the tenants of these chattel interests; and, from the power which, prior to the statute of 21 Hen. VIII. c. 15, the freeholder possessed, of defeating such interests, by suffering his own title to be impeached in a feigned action. An estate for years may also merge in an estate in fee; and an estate *pour autre vie* in an estate for one's own life. So an estate for years may merge in another estate or term of years, in remainder or reversion, when the term to be merged is of shorter duration than the other.³

SECTION V.

BY SURRENDER.

§ 507. A *surrender* is the yielding-up of an estate for life or years, to him that has the immediate reversion or remainder, wherein the particular estate may become extinct by mutual agreement between them.⁴ It is either in *express words*, by which the lessee manifests his intention of yielding up his interest in the premises to the lessor; or *by operation of law*, when the parties, without any express surrender, do some act which implies that they have both agreed to consider the surrender as made. It differs

¹ 3 Prest. on Conv. 310.

² *Ib.* 294, 378; *Donnisthorpe v. Porter*, 98.

² *Eden*, 162.

³ 3 Prest. on Conv. 176; 4 Kent, Com.

⁴ *Co. Lit.* 837, b; *Schieffelin v. Carpenter*, 15 Wend. 400.

from a *release* in that the latter operates by the greater estate descending upon the less; while a surrender is the falling of a less estate into a greater. The term *surrender by operation of law* is properly applied to cases where the owner of a particular estate has been a party to some act, the validity of which, he is by law, afterwards estopped from disputing, and which would not be valid, if his particular estate continued to exist. Thus where a lessee for years accepts a new lease from the reversioner, he is estopped from saying that his lessor had no power to make the new lease; and, as the lessor cannot grant a new lease until the prior one has been surrendered, the acceptance of such new lease necessarily implies a surrender of the former one. Such a surrender is the act of the law, and takes place independently of the intention of the parties.¹ All such acts, however, as bind parties to a surrender, operate by way of estoppel, and must be acts of notoriety, not less formal and solemn than the execution of a deed, as, for instance, livery, entry, acceptance of an estate, and the like.²

§ 508. *The person to whom the surrender is made* must, as we have said, have an estate immediately in reversion or remainder; but it is immaterial whether he has it in fee, in tail, or for life. For this reason, an under-lessee cannot surrender to the original lessor;³ but a lessee for years may surrender to him who has the reversion only for years, though the lease be for several years, and the rever-

¹ *Challoner v. Davies*, 1 Ld. Ray. 402; *Livingston v. Potts*, 16 Johns. 28. After a lessee had underlet the premises to two separate tenants, the landlord called on the undertenants and demanded the rent reserved, forbade them to pay any more rent to the original lessee, and said he had taken the place off the lessee's hands; Judge Sandford, of the New-York Superior Court, said it was impossible, on the facts of this case, to resist the conclusion that there was a surrender, in law, of the term granted by the original lease. *Bailey v. Delaplaine*, 1 Sandf. 5. A lease dated Dec. 1, 1855, and running three years and nine months, with power to remove buildings erected by the tenant, was held to be surrendered, and its provisions abrogated by a second lease, dated Dec. 6, 1856, containing different terms, and among them a clause for the surrender of the premises at the expiration of the term, reasonable use and wear thereof, and damages by the elements excepted; and that under the second lease the tenant could not remove the buildings. *Jungerman v. Bovee*, 19 Cal. 354.

² *Lyon v. Reed*, 18 M. & W. 285; 7 S. & R. 374. Where one, not a party to a lease, is shown to be in possession of demised premises in subordination to such lease, the law presumes that he is an assignee of the lessee; but this presumption is rebutted by proof that, during the possession of the third party, the lessor received from the lessee a surrender of the term. Such surrender, if produced by the lessor, is an admission that the lessee, and not the occupant, was, at its date, tenant to the lessor. *Durando et al. v. Wyman*, 2 Sandf. 597. A lease for a term of years may be terminated by the landlord's resuming the control of the premises, by the consent and with the approval of the tenant. *Williams v. Jones*, 1 Bush, 621.

³ 2 Prest. on Abst. 7. The doctrine of surrender cannot apply, on a lease in fee, for there is no reversion. *Springstein v. Schermerhorn*, 12 Johns. 357. A surrender which cannot operate as such by reason of an intervening term will take effect as a grant of the term. *Doe v. Brown*, 2 Ellis, & B. 331.

sioner has it only for one year, or a less term.¹ And if a lessee demises part of his estate to the lessor, he may surrender the other part; for the reversion of that part remains in the lessor.² A surrender to an infant is good; for his assent will be presumed till a disagreement appears.³ There can be no surrender, however, except by a party in possession; and it can only be made to the person having a higher estate, in which the estate surrendered may merge. Therefore, a tenant for life cannot surrender to him in remainder for years; nor to a tenant for years, who is ousted of his term before entry, for he has but a bare right. Neither can one joint tenant surrender to another.⁴

§ 509. At common law, an express surrender of things lying in grant could only be made by deed, although a surrender of things in possession might be made by parol, without livery of seisin, or other formal mode of conveyance, as it was but a restoration of the particular estate to him, in reversion or remainder.⁵ But the statute of frauds prohibits a term of years, or other interests in lands, to be surrendered, unless by deed, or note in writing, or by operation of law. A deed is not, therefore, necessary to effect a surrender, since it may be by a note in writing. But no verbal arrangement or agreement between the parties can effect such a purpose, nor cancel a lease for years.⁶ Therefore a mere parol agreement between a landlord and tenant, to determine a tenancy in the middle of a quarter is not binding.⁷ And although a tenant may agree in writing to surrender his lease for a particular purpose, which purpose is not effected, such conditional agreement will not operate as a surrender.⁸ But an unconditional agreement between the landlord and a third person with the assent of the tenant, during the term, to rent the premises to such third

¹ *Hughes v. Robotham*, Cro. El. 302.

² 2 Rol. Abr. 494. An assignment of a lease by the lessee to the lessor as collateral security for a debt, does not operate as a surrender or merger of the lease, but as a mortgage only. *Breese v. Bange*, 2 E. D. Smith, 474. And where a tenant abandoned the premises, the reletting of them by the landlord at the request of a surety for the rent, and for his account, does not amount to such a surrender of the premises as to discharge the surety. *McKensie v. Farrell*, 4 Bosw. 192.

³ *Thompson v. Leach*, 2 Vent. 198, 208.

⁴ 2 Rol. Abr. 494; *Shep. Touch.* 303; 2 Marsh. 33.

⁵ Co. Lit. 338, a; *Wilston v. Pilkney*, 1 Vent. 242.

⁶ *Rowan v. Lytle*, 11 Wend. 616; *Farmer v. Rogers*, 2 Wils. 26; *Matthews v. Sawell*, 8 Taunt. 270; *Peters v. Barnes*, 16 Ind. 219.

⁷ *Thomson v. Wilson*, 2 Stark. 379; *Bailey v. Wells*, 8 Wisc. 141. Although such license, accompanied by some act of the landlord, indicating his acceptance of possession, may, together, operate as a surrender, by operation of law. *Grimman v. Legge*, 8 B. & C. 324.

⁸ *Coupland v. Maynard*, 12 East, 184; *Hamerton v. Stead*, 3 B. & C. 478.

person, followed by a change of possession and the payment of rent by the new tenant, amounts to a valid surrender of the old lease, and an acceptance thereof on the part of the landlord.¹

§ 510. The technical and proper words of a surrender are, *surrender and yield up*; but any form of words, by which the intention of the parties is sufficiently manifested, will operate as a surrender.² Thus if a lessee for years remise, release, discharge, and for ever quitclaim to the lessor, all his right, title, and interest in or to such lands, it will amount to a surrender. Or if a lessee for life leases to the lessor for the life of the lessee, this is equivalent to a surrender.³ But a written notice given by the tenant, of his intention to quit at a time when he believed his tenancy would expire, but which is afterwards discovered not to be the true time, will not operate as such.⁴ And where one tenant in common of a reversion agreed in writing with another, who was possessed of a term in the whole of the land, to give him a certain sum on a given day, when either a sale or a partition of the estate was to be made, as a compensation for quitting possession, and the other agreed to give up possession on a day subsequent to that fixed for the payment, it was held that the instrument did not operate as a surrender when signed.⁵ Nor will an agreement between the lessor and a stranger that the lessee shall have a new lease, or an acceptance by a lessee of a new lease in trust for another, in either case amount to a surrender.⁶

§ 511. *The erasure or cancellation of a deed* will not divest the estate; nor will the tearing off the names of the parties, or of the seals;⁷ or the destruction of the instrument by mutual consent, operate as a surrender; because a deed is not the essence of a contract, but only the evidence of it; and, therefore, the destruction of the lease or contract would not follow upon the destruction of the deed.⁸ This is a necessary consequence of the statute of frauds, which declares that no leases, estates, or interests, either of freehold or term of years, shall be assigned, granted, or *surren-*

¹ *Whitney v. Meyers*, 1 Duer, 266. The statute of New York of April 13, 1860, which authorizes a tenant to quit and surrender the lease of a building, which, without any fault or neglect on his part, shall be so injured by the elements, or other cause, as to become untenanted and unfit for occupation, seems to require no other formality to operate a surrender, than that the tenant shall quit possession and notify the landlord that he has done so.

² *Smith v. Mapleback*, 1 T. R. 441.

³ *Challoner v. Davies*, 1 Ld. Ray. 402; 2 Rol. Abr. 497.

⁴ *Doe v. Milward*, 3 M. & W. 328.

⁵ *Weddall v. Capes*, 1 M. & W. 50.

⁶ *Porry v. Allen*, Cro. El. 178; Com. Dig. Surrender, H. L. 1.

⁷ *Doe v. Thomas*, 9 B. & C. 288.

⁸ *Raynor v. Wilson*, 6 Hill, 469; *Rowan v. Lytle*, *supra*; *Whitton v. Smith*, Freeman, 85; *Nicholson v. Halsey*, 1 Johns. Ch. 417.

dered, unless by deed, or note in writing, signed by the party or his agent, or by act or operation of law. The statute from the time of 29 Charles II., intended to take away the former mode of transferring interests in lands, by signs, symbols, and words only; and, therefore, as livery of seisin on a parol feoffment was a sign of passing the freehold, before the statute, but is now taken away, so the cancelling of a lease was the sign of a surrender, before the statute, which is now taken away, unless there be a writing under the hand of the party.¹ The fact of cancellation, however, may be strong corroborating evidence in aid of other proof, such as the granting of a new lease to other parties, that a surrender in law has taken place.²

§ 512. A surrender by act and *operation of law* is a case excepted out of the statute; for the acceptance, by the tenant, of a new lease of the same premises, during the period of the first lease, will be deemed to be a virtual surrender of the former lease. It admits the capacity of the lessor to make such a lease, which he would not have without a surrender of the first lease, and the presumption of law is, that such lease has been surrendered; for no man would take from another a lease of a farm or house, of which he has already the legal control, and agree to pay him rent for it.³ This presumption is raised by the circumstances of the case, and by the acts of the parties; showing that the acceptance of the second lease, even for a shorter term than the first, implies a surrender of the first. But as this presumption of a surrender arises from the acts of the parties, which are supposed to indicate an intention to that effect, it must follow, that where no such intention can be presumed without doing violence to common sense, the presumption cannot be supported. The cases have settled, that simply receiving a second lease raises this presumption; but if the acts of the parties, taken all together, are such as to rebut the idea of a surrender, then none ought to be presumed.⁴ An acceptance of a surrender will not be presumed from mere lapse of time; nor from the circumstance that rent has been paid by a third person, and not by the original tenant.⁵ And the second

¹ *Roe v. Archbp. of York*, 6 East, 86. *Roe v. Archbp. of York*, 6 East, 86, 90, 101.

² *Walker v. Richardson*, 2 M. & W. 882; *Wootley v. Gregory*, 2 Younge & J. 536; *Holbrook v. Tirrell*, 9 Pick. 105.

³ *Coleman v. Maberly*, 8 T. B. Monr. 220; *Jackson v. Gardner*, 8 Johns. 394;

⁴ *Van Rensselaer's Heirs v. Penniman*, 6 Wend. 569; *Hutchins v. Martin*, Cro. El. 605; *Springstein v. Schermerhorn*, 12 Johns. 357; *Livingston v. Potts*, 16 *id.* 28.

⁵ *Doe v. Cooke*, 6 Bing. 174; *Copeland*

lease, which is thus to work a surrender of the first, must be good and valid in law to vest in the lessee the term it professes to convey; and must bind him to a performance of its conditions on his part; for, if such lease be void, its acceptance by the lessee is no surrender.¹ If, therefore, a lease be made to a minor, it is no surrender of a former lease, unless he assents to it when at full age.² Nor will it amount to a surrender if the new lease be made to one who is *non compos mentis*, for he cannot assume an obligation to pay rent.³ And the acceptance of a new lease by the same tenant at an increased rent will not be deemed a surrender where the lessee at the same time protests against the right of the lessor to exact an increased rent, claiming a renewal of the lease, at the original rent.⁴

§ 513. A lease to commence *in futuro* may operate as an immediate surrender of the first lease, but there cannot be a surrender to operate *in futuro*.⁵ And though a new lease is granted conditionally, it may yet operate as a surrender in law; as where a man made a lease for forty years, and the lessee afterwards took a lease for twenty years, upon condition that, if he did a particular act, the second lease should be void, and the lessee afterwards broke the condition, so that the second lease became void, the first lease was nevertheless, deemed to have been surrendered.⁶ But a parol agreement between a landlord and tenant, of a term of six years,

v. Watts, 1 Stark. 96. It is necessary in every case, in order that the new agreement may be effectual to work a surrender by operation of law, that it be valid and sufficient to vest in the new tenant or lessee, the estate or term contemplated by the parties, and bind him to pay the stipulated rent. *Whitney v. Meyers*, 1 Duer, 266.

¹ *Davison v. Stanley*, 4 Burr. 2210; *Schieffelin v. Carpenter*, 15 Wend. 400; *Smith v. Niver*, 2 Barb. 180. A lessor who has consented to a change of tenancy and permitted a change of occupation and received rent from the new tenant, cannot afterwards charge the original tenant with rent accruing during the occupation of the new tenant. Per *Harris, J.*

² *Ib.*; *Lloyde v. Gregory*, Sir Wm. Jones, 405.

³ *Thompson v. Leach*, 2 Vent. 198.

⁴ *Tracy v. Albany Exch. Co.*, 7 N. Y. 472. This doctrine of a surrender by operation of law has been extended to cases in which the tenant has not himself taken a new lease, but has put a third person in possession of the premises, who has with

his own concurrence and the concurrence of the landlord, been treated as the landlord's immediate tenant. *Thomas v. Cook*, 2 B. & A. 119. *Johnstone v. Huddleston*, 4 B. & C. 922. And has been acted upon in several American cases. *Smith v. Niver*, *supra*; *Bailey v. Delaplaine*, 1 Sandf. 5; *Logan v. Anderson*, 2 Doug. Mich. 101. In *Whitney v. Meyers*, *supra*, it was held that an absolute parol lease, made by the landlord to a new tenant, during the term of a written lease, with the consent of the first lessee, amounts to a surrender of the first lease.

⁵ *Doe v. Milward*, 8 M. & W. 328; *Hutchins v. Martin*, Cro. El. 605. A tenant of a lease under seal, agreed without seal, that if he failed to perform certain things, he would relinquish his lease; held, that though for want of a seal this could not operate as a defeasance, it was operative as a contingent surrender, taking effect absolutely on failure. *Allen v. Jaquish*, 21 Wend. 628.

⁶ *Co. Lit.* 218, b; *Thursby v. Plant*, 1 Saund. 286, b.

that the tenant shall surrender his interest in the demised premises, and that the landlord shall execute a new lease to a third person, does not operate as a surrender unless such new lease be executed, and pass an interest according to the contract and intention of the parties; although the tenant quits the premises, the third person enters and remains in possession for the space of a year, and pays rent to the landlord; for the original lease remains in force, and the landlord may maintain an action of covenant for rent against the original tenant, for rent subsequently accrued.¹ Nor will a recital in a second lease, that it was granted in part consideration of a surrender of a prior lease of the same premises, amount to a surrender by deed, or note in writing, of such prior lease; because it does not purport by its terms to be a surrender or yielding up of the interest.²

§ 514. A tenancy from year to year, or for years, cannot be surrendered by mere agreement of the landlord to accept a third person in the place of his tenant, unless the agreement be in writing, or such third person actually takes possession. In the latter case it is held, that a parol agreement between a landlord and tenant from year to year, that another tenant should be substituted in his place, who was accordingly substituted, is a sufficient surrender under the statute of frauds, to determine the former tenancy.³ It has been held, also, that if a landlord attest a notice, given by a lessee to his under-tenant, to pay rent to the landlord, and have knowledge of its contents, it will terminate the tenancy of the lessee, and discharge him up to that time.⁴ Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease, to be granted to him and another jointly, and both entered upon and occupied the premises jointly; it was held, that the first tenancy was determined, though the lease was never executed pursuant to the agreement.⁵ So where the tenant underlet the premises, and the landlord accepted the under-tenant as his tenant, and collected rent from him, which arrangement was assented to by the

¹ *Schieffelin v. Carpenter*, 15 Wend. 400.

² *Roe v. Archbp. of York*, 6 East, 86.

³ *Stone v. Whiting*, 2 Stark. 235; *Whitney v. Meyers*, *supra*.

⁴ *Harding v. Crethorn*, 1 Esp. 57. Under a lease with the usual provision that if the premises became vacant, the

landlord might relet, and charge the tenant with any deficiency of rent, the tenant gave notice of his inability to continue to pay rent, and the landlord thereupon consented to a reletting, there was held to be no surrender, but that the original lessee was still liable for a deficiency. *Ogden v. Rowe*, 8 E. D. Smith, 312.

⁵ *Hamerton v. Stead*, 3 B. & C. 478.

original tenant; the court held that this amounted to a virtual surrender of the tenant's interest, by operation of law.¹

§ 515. *An actual and continued change of possession*, by the mutual consent of the parties, will amount to a surrender by operation of law; whether the possession is delivered to the landlord himself, or to another in his behalf.² Thus, where the owner of a ferry leased it to a person verbally, for a certain rent, but the man, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the owner as boatman, which was assented to, and he received wages for his services; the court decided that this was a surrender to the owner of his interest in the ferry.³ And although a tenancy from year to year is not determined by a parol license from the landlord, to quit in the middle of the quarter,⁴ yet, if, in such a case, both parties act upon such license, and the landlord takes possession, so as to render it impossible for the tenant subsequently to use or occupy the premises, the tenancy is thereby legally determined.⁵ So, in Massachusetts, it was held that a lease of a dwelling-house, under seal, was determined by the delivery of a key to the lessor, accompanied by his receipt of it and putting another tenant in the house.⁶ But where a surrender is effected by a change of possession, the consent of all parties to the change of tenancy seems to be necessary. For where a tenant from year to year agreed by parol with the landlord's agent to quit at the ensuing quarter-day, and the premises were relet by auction, at which the tenant attended and bid, but the new tenant was not let into possession, as the old tenant refused to quit; it was held that this did not amount to a surrender by operation of law.⁷

¹ *Thomas v. Cook*, 2 B. & A. 119. In *Murray v. Shave*, 2 Duer, 188, the tenant requested to be allowed to give up her lease, and the landlord thereupon entered into a new agreement with another person. This was held a virtual acceptance by the landlord of the tenant's offered surrender, and discharged her from her liability on the lease.

² *Hall v. Burgess*, 5 B. & C. 382; *Reeve v. Bird*, 1 Cr. M. & R. 87; *Grimman v. Legge*, 2 Mann. & R. 488, note. *Wood v. Partridge*, 11 Mass. 498. "The rule of law as now settled by the recently adjudicated cases is, that any acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession of the demised premises, amount to a surrender

by operation of law." Per Bigelow, C.J., *Talbot v. Whipple*, 14 Allen, 177.

³ *Peter v. Kendal*, 6 B. & C. 708.

⁴ *Mollett v. Brayne*, 2 Camp. 108; *Thomson v. Wilson*, 2 Stark. 379; *Doe v. Johnston*, 1 McClel. & Y. 146.

⁵ *Whitehead v. Clifford*, 5 Taunt. 518; *Grimman v. Legge*, 8 B. & C. 324; *Walls v. Atcheson*, 8 Bing. 462; *Smith v. Niver*, 2 Barb. 180.

⁶ *Randall v. Rich*, 11 Mass. 494; *Dodd v. Acklom*, 6 M. & G. 672. In this case it is held, that where there are two landlords, an acceptance of the key by one binds the other, where the latter leaves the management of the business to the former.

⁷ *Alchorne v. Gomme*, 2 Bing. 54; *Carpenter v. Thompson*, 8 N. H. 204.

§ 516. If a landlord *underlets the premises*, without notice to the tenant that it is on his account, it dispenses with a surrender on the part of the tenant.¹ And where tenants holding from year to year, under the same landlords, agree to exchange with the consent of the agent of both landlords, and take possession, it will operate as a surrender of the old tenancies, and the creation of new demises.² But no mere agreement between a landlord and tenant, for the substitution of another tenant, or any other act of a landlord which can be referred to a different motive, will amount to a surrender.³ Where, however, A. leased to B. for eight years, B. assigned to C., and C., on application by A. to have the premises, made with A. the following agreement: "A. to have the premises on the terms mentioned in the original lease, and to pay £8. 10s. over and above the rent annually, towards the good-will;" it was held, that this agreement was not an under-lease from year to year, but a surrender of the original term; since the lessor was to have the premises *on the terms of the original lease*, and one of those terms was, at the then present time, a right to hold the premises for the unexpired term.⁴ Where a tenant from year to year underlet the premises, and the original landlord accepted the under-tenant as his tenant, with the lessee's assent, but there was no surrender in writing of the lessee's interest, and, the rent being subsequently in arrear, the landlord distrained on the under-tenant, it was held, that these circumstances constituted a valid surrender of the lessee's interest.⁵ But a deed executed between landlord and tenant, reciting "that it had been agreed that the tenant should quit and deliver up the premises, that a valuation of his effects upon the premises should be made, which, in the mean time, were to be assigned, and which accordingly were as-

Mere proof that the key had been delivered to a servant at the landlord's house, and a subsequent declaration that the key had been lost or mislaid, is no evidence of an acceptance of a surrender. *Harland v. Brownley*, 1 Stark. 455. Nor will an acceptance be presumed, from the circumstance of the rent having been paid, not by the original tenant, but by a third person. *Copeland v. Watts*, 1 Stark. 95; or by the mere production of the lease with the names of the parties erased. *Doe v. Thomas*, 9 B. & C. 238.

¹ *Walls v. Atcheson*, 8 Bing. 462. The necessity of a written surrender is dis-

pensed with, where a lessee quits in the middle of a term, and the lessor lets the premises to another; and a surrender of the term is effected by any other new arrangement between the parties, which is inconsistent with the former relation of landlord and tenant. *Peter v. Kendal*, 6 B. & C. 703.

² *Bees v. Williams*, 2 Cr. M. & R. 581.

³ *Griffith v. Hodges*, 1 C. & P. 419.

⁴ *Smith v. Mapleback*, 1 T. R. 441.

⁵ *Thomas v. Cook*, 2 B. & A. 119. *Walker v. Richardson*, 2 M. & W. 882.

signed to trustees for the landlord," operated as a conditional surrender only.¹

§ 517. *The agreement to substitute must be mutual*, otherwise the tenant will not be discharged from his liability. As where two partners agree to hold for three years, with power to extend the term to seven, on notice. Before the expiration of the three years, or any notice being given, one of the partners retired, and another was admitted in his place. Notice was afterwards given, by the continuing partner for an extension of the term, and the landlord, by letter expressed himself willing to grant a new lease to him and the new partner, but the letter was not communicated to the retiring partner, so that the agreement was not mutual, nor was any lease prepared; the landlord received rent, first from the continuing partner alone, and afterwards from him and the new partner. The retiring partner was held not to be discharged from his liability for rent during the remainder of the three years.² And if there is any fraudulent concealment on the part of an outgoing tenant, the tenancy will not be dissolved; as if he conceals the fact, that the party introduced by him has compounded with his creditors.³

§ 518. The effect of a surrender is, to terminate the relation of landlord and tenant, and with it all the obligations of the parties to that relation; but it does not discharge the lessee from the payment of rent already due.⁴ And in order to guard against the consequences which might otherwise result from a surrender, in discharging an under-lessee from the payment of rent, and the conditions and covenants annexed to the lease, in cases where he cannot be persuaded to concur in the arrangement, the statute of 4 Geo. II. c. 28, provided, that if a lease be surrendered in

¹ Coupland v. Maynard, 12 East, 184.

² Graham v. Whichelo, 1 Cr. & M. 188; s. c. 3 Tyr. 201.

³ Bruce v. Ruler, 2 Mann. & R. 8. A surrender is never allowed to operate injuriously upon the rights of third parties; and therefore a tenant cannot, by a surrender of his lease to his landlord, affect the estate or rights of his under-lessee. Shep. Touch. 301; McKenzie v. Lexington, 4 Dana, 129. But although a tenant who has made an under-lease cannot by a surrender prejudice his tenant's interests, yet he will himself lose the rent he has reserved upon the under-lease; for since rent is an incident to the reversion, the surrenderor

cannot collect it, because he has parted with his reversion to the lessor, nor can the surrenderee leave it, because, although the reversion to which it was incident has been conveyed to him, yet as soon as it was so conveyed, it merged in the greater reversion of which he was already possessed, and the consequence is, that the under-lessee holds without the payment of any rent, except where the contrary has been expressly provided by statute. Smith's Landl. & T. 232.

⁴ Shepard v. Merrill, 2 Johns. Ch. 276; Sperry v. Miller, 8 N. Y. 836. Nor his surety; McKenzie v. Farrell, 4 Bosw. 192.

order to be renewed, and a new lease given, the relation of landlord and tenant, between the original lessee and his under-lessee, should be preserved; and it placed the chief landlord and his lessees and the under-lessee, in reference to rents, rights, and remedies, exactly in the same situation as if no surrender had been made.¹ In conformity to the English statute, the Revised Statutes of New York have enacted, that if a lease be surrendered, in order to be renewed, and a new lease be made by the chief landlord, such new lease shall be good and valid, to all intents and purposes, without a surrender of all or any of the under-leases, derived out of the original lease so surrendered; and the chief landlord, his lessee, and holders of such under-leases, shall enjoy all their rights and interests in the same manner, and to the same extent, as if the original lease had been still continued; and the chief landlord shall have the same remedy by distress or entry, upon the demised premises, for the rents and duties secured by such new lease, so far as the same do not exceed the rents and duties reserved in the original lease so surrendered.² In those States in which this provision has not been adopted, the question may arise how far the under-tenant (whose derivative estate still continues) is discharged from the rents and covenants annexed to his tenancy, in which, as Chancellor Kent intimates, upon the authority of the English cases, that inequitable result is indicated.³

SECTION VI.

CONTINGENT MODES OF DISSOLVING A TENANCY.

(a.) *Premises taken for Public Use.*

§ 519. In addition to the several methods of dissolving a tenancy which have been mentioned, it further remains to be observed, that a lease for years, made by a disseisor or other wrong-doer, is absolutely determined by the entry of the disseisee, or rightful possessor. But if the disseisee confirms the lease when out of possession, he cannot, after entry, avoid it; because he has, by his

¹ 4 Kent, Com. 108.

² 1 R. S. 744.

³ 4 Kent, Com. 108; *Thre'r v. Barton* Moore, 94; *Webb v. Russell*, 8 T. R. 401.

confirmation, parted with so much of his ancient right as to deprive himself of the power of avoiding it.¹ And, whenever the estate which a lessor had, at the time of making the lease, is defeated or in any other manner determined, the lease is extinguished with it.² If, therefore, a lot of land, or other premises under lease, is required to be taken, for city or other public improvements, the lease, upon confirmation of the report of the commissioners, becomes void. And, in the event of closing up a street or road, on which the leased premises are situated, if they are no longer upon, or contiguous to, a public highway, the lease becomes void.³ But if only a part of the lot is taken for such purposes, the lease is not thereby extinguished, even *pro tanto*, except by force of a statute; nor is the lessee discharged of his liability to pay rent for the residue of the term, but the lessor and lessee are each entitled to recover compensation for their respective damages.⁴ Nor will the appropriation, by the public canal commissioners, of a mill-privilege, which was the subject of a demise, amount to a discharge of the lessee from all his obligations; for he is entitled to compensation for the injury he has sustained.⁵

¹ 1 Co. 147, a; Bac. Abr. Lease, 1.

² Harvey's case, 4 Leon. 161. In general the relation of landlord and tenant is destroyed by a judgment of eviction against the tenant, by one having a superior title. Thus a judgment of foreclosure defeats the mortgagor's lease as well as the equity of redemption; the lessor's title being cut off, the lease executed by him becomes void. *Burr v. Stanton*, 52 Barb. 877; and without an actual eviction the tenant may purchase in the better title for his own protection; but such is not the case where successful resistance could have been made to the recovery, or the tenant has neglected to give notice to his landlord of the suit for possession. *Mills v. Peed*, 16 Ky. 180.

³ 2 N. Y. Rev. Laws, 1818, p. 417, and Laws of 1824; *Mills v. Baer's Ex'rs*, 24 Wend. 454; *Barker v. Hodgson*, 3 Maule & S. 270.

⁴ *Parks v. City of Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 id. 159; *M'Laren v. Spaulding*, 2 Cal. 510; *Workman v. Miffin*, 30 Pa. St. 362; *Schuykill Co. v. Schmele*, 57 id. 271; *Foote v. Cincinnati*, 11 Ohio, 408; although the law is otherwise in Missouri, *Biddle v. Hussman*, 28 Mo. 597; *Kingsland v. Clark*, 24 id. 24;

and in New York, by statute, *Gillespie v. Thomas*, 15 Wend. 467.

⁵ *Folts v. Huntley*, 7 Wend. 210. The commissioners who estimate the loss and damage consequent upon taking land for a public improvement, are bound to take into consideration all the covenants and conditions of a lease of land required for the contemplated improvement, when such land is held for a term of years under lease, and consequently if there be a covenant for renewal of the term, and such renewal at the rent reserved will add to the value of the tenant's interest in the land, it is their duty to award such value in addition to the present value of the term to the tenant and not to the landlord, the latter being entitled only to the value of the reversion after the expiration of the time which would have been embraced in the renewed lease had the same been executed. In the matter of *William and Anthony Streets*, 19 Wend. 678. The tenant is to be considered owner of the term, and his landlord owner of the reversion, and the interest of each is to be regarded by the commissioners. *Gillespie v. Thomas*, 15 Wend. 464; *Turner v. Williams*, 10 id. 189; *Coutant v. Catlin*, 2 Sandf. Ch. 486.

(b.) *Destruction of Premises.*

§ 520. When the subject-matter of the demise is entirely destroyed, the lease perishes with it. As where there is a lease for years of particular apartments in a building of several stories, and the whole building is destroyed by fire at any time during the term, the lessee's whole interest is gone; for, having no estate in the land, the thing granted, that is, the tenement, has ceased to exist. This principle was recognized and acted upon in the case of *Kerr & King v. The Merchant's Exchange Company*, in the city of New York. The company had made a lease for years of certain apartments in the basement of the Exchange, previous to the destruction of that building by the great fire of 1835; upon the rebuilding of the Exchange, the lessees applied to be let into possession of similar apartments in the basement, on the ground of their lease having not yet expired; but the court held that their lease was extinguished by the destruction of the premises, and that they had no interest in the new building.¹

(c.) *Using the Premises for an illegal purpose.*

§ 521. A lease of premises, for the purpose of prostitution, or for any other immoral object, is a contract against good morals, and absolutely void.² And the doctrine has been carried so far in England as to prevent a landlord's recovery of rent for the use of premises, which have been occupied with his knowledge for purposes of prostitution, though not originally let for that purpose.³ But if the original agreement was honest, and the premises are subsequently appropriated to vicious uses, without the landlord's

¹ *Kerr v. Merch. Exch. Co.* 8 Edw. Ch. 315; *Winton v. Cornish*, 5 Ohio, 477. See also, *Andrews v. Needham*, Noy, 75; *Ewer v. Heydon*, Cro. El. 656; *Stockwell v. Hunter*, 11 Metc. 448. In the case of *Graves v. Berdan*, 26 N. Y. 498, the Court of Appeals recognized this principle, and absolved the lessee from his covenant for the payment of rent, where the building was entirely destroyed by fire, and he had no interest in the land. So *Womack v. McQuarry*, 28 Ind. 108, where a mill and one room of adjoining building demised, were destroyed by fire, the lessee was discharged from paying rent for the latter, but not for the former. But the English law seems otherwise. *Izon v. Gorton*, 5 Bing.

N. C. 501. In Louisiana, the failure of a lessor to maintain the premises in tenantable condition determines the lease. *Coleman v. Haight*, 14 La. An. 664.

² *Girardy v. Richardson*, 1 Esp. 18. A landlord who lets his premises to a woman of ill fame, knowing her to be such, with the intent that the same shall be used for the purpose of prostitution, and they are so used, is indictable at common law. *Commonwealth v. Harrington*, 8 Pick. 26; and see *Same v. Willard*, 22 id. 478; *Boardman v. Merrimack M. F. I. Co.* 8 Cush. 584; *Commonwealth v. Moore*, 11 id. 600.

³ *Jennings v. Throgmorton*, Ry. & M. 251.

connivance, or if the woman merely lodges there, and receives her visitors elsewhere, the lease is not thereby avoided at common law.¹ It is provided, however, by statute, in New York, that if the lessee of any dwelling-house shall be convicted of keeping a bawdy-house, the lease or agreement for letting the same shall thereupon become void, and the landlord may enter upon the premises so let, and shall have the same remedies to recover possession, as are given by law in case of a tenant holding over after the expiration of his lease.² And a recent statute in the same State now authorizes the owner or landlord of premises used or occupied as a bawdy-house, or house of assignation for lewd persons, to take summary proceedings for the removal of the occupants therefrom, in the same manner as for the non-payment of rent. And if the owner or landlord neglects to institute such proceedings, after having been notified by any tenant or owner of property in the immediate neighborhood to do so, the party giving such notice may take the proceeding.³

§ 522. We have seen, when discussing the subject of a forfeiture of the term, that the tenant would, at common law, forfeit his estate by certain acts assuming a position hostile to his landlord.⁴ One of these grounds of forfeiture—conveyance by the lessee of a greater estate than his own, and which never applied to conveyances operative under the statute of uses⁵—has been removed by statute in New York,⁶ and probably in most of the United States.⁷ It was probably also no ground of forfeiture of a lease for years at common law, though sometimes said to be, that a lessee had merely verbally asserted his own title to the premises, and on that ground refused to pay rent.⁸ Certainly a mere denial

¹ *Appleton v. Campbell*, 2 C. & P. 847. The New-York Common Pleas hold that a lessor's knowledge of facts, from which he may reasonably suppose an intention on the part of a lessee to use the premises for an illegal purpose, followed by their actual use for that purpose, within the observation of the lessor, is not in itself sufficient to avoid the lease, unless the lessor is a direct party to the illegal intent. *Udike v. Campbell*, 4 E. D. Smith, 570; and see *O'Brien v. Brienbach*, 1 Hilt. 804.

² 2 R. S. 702, § 29. As to how far a tenant will be justified in terminating a lease, when the landlord erects a nuisance upon the premises, see *ante*, §§ 880, 881, and notes; § 875 in note. In Louisiana, it is held that a lessor may rescind a lease,

where the building is used for a purpose not contemplated by the parties at the time of entering into the contract, and which is injurious to him. *Caffin v. Scott*, 7 Rob. La. 206.

³ Laws of 1868, p. 1724, and see, *post*, § 728, b. So in Massachusetts Gen. Stat. c. 87, § 8.

⁴ *Ante*, § 488.

⁵ *Jackson v. Mancius*, 2 Wend. 367; *Grout v. Townsend*, 2 Hill, 554.

⁶ 1 R. S. 789, § 143.

⁷ 4 Kent, Com. 104; Mass. Gen. St. c. 89, § 9.

⁸ *Doe v. Wells*, 10 A. & E. 427; *Delancy v. Ganong*, 9 N. Y. 9; *Rees v. King*, Forrest, Exch. 22.

of the landlord's title by parol or payment of rent to a stranger, will in neither case, taken singly, amount to a forfeiture of the term.¹ But if the tenancy is from year to year or at will, the law is otherwise, for these tenancies are always determinable by notice, and as this is waived by a denial of the relation of landlord and tenant, the tenancy is in fact forfeited.² So even a lease for years is forfeited by a fraudulent attornment, as by tenant's accepting a lease from a stranger, and on that ground refusing to pay rent.³ But independently of the common law doctrine of forfeiture, it is now held—at least in several of the United States—that if a tenant, even by mere words, distinctly repudiates the lessor's title, and asserts one in himself, and this is made known to the lessor, the tenant's holding becomes adverse, and will, in due time, ripen into a fee by adverse possession; and therefore he is at once a trespasser liable to ejectment or summary process by the lessor; and his tenancy, whether for years or at will, is forfeited.⁴

¹ *Ibid.*

² *Doe v. Long*, 9 C. & P. 778; *Doe v. Grubb*, 10 B. & C. 816; *Doe v. Rollings*, 4 C. B. 188; *Doe v. Evans*, 9 M. & W. 48; *Doe v. Gower*, 17 Q. B. 589; *Bolton v. Landus*, 27 Cal. 104; *Duke v. Harper*, 6 Yerg. 280; *Brown v. Keller*, 82 Ill. 152; *Smith v. Ogg Shaw*, 16 Cal. 88; *Doe v. Frowd*, 4 Bing. 557; but otherwise where the title is in controversy, and the tenant refuses to pay until it is settled. *Jones v. Mills*, 10 C. B. n. s. 788.

³ *Doe v. Pittman*, 2 Nev. & M. 678; *Doe v. Flynn*, 1 Cr. M. & R. 187; but not until made known to the lessor; *Doe v. Reynolds*, 27 Ala. 864, 876; and see *Russell v. Fabyan*, 84 N. H. 223.

⁴ This seems the law in the United States courts; *Willison v. Watkins*, 3 Pet. 48; and see *Peyton v. Stith*, 5 id. 485,

491; *Walden v. Bodley*, 14 id. 156; *Zeller v. Eckert*, 4 How. 239; the law being laid down without limitation as to character of tenancy, and on principle, there seems no reason for any discrimination; Vermont, per Redfield, C. J. *Sherman v. Champl. Transp. Co.*, 31 Vt. 177; *Hall v. Dewey*, 10 id. 598, 599; *Greeno v. Munson*, 9 id. 87; *Briggs v. Oakes*, 26 id. 145; New York, in an early case, *Jackson v. Vincent*, 4 Wend. 633, though controverted in *Delancy v. Ganong*, 9 N. Y. 9; Illinois, *Fortier v. Ballance*, 5 Gilm. 41; *Fusselman v. Worthington*, 14 Ill. 185; *Wall v. Goodenough*, 16 id. 415; South Carolina, *Trustees v. Meetze*, 4 Rich. Law, 50, 52; California, *Van Winkle v. Hinckle*, 21 Cal. 842; and Pennsylvania, *Newman v. Rutter*, 8 Watts, 55.

CHAPTER XII.

THE CONSEQUENCES OF A DISSOLUTION.

§ 523. THE tenancy being ended, the right of possession reverts to the landlord; who may at once re-enter upon the premises. But if the tenant continues to hold over, and the landlord breaks in upon him forcibly, so as to endanger a breach of the peace, he runs the risk of an indictment, at the hands of the public prosecutor, though not an action of trespass at the suit of the tenant.¹ The tenant, on the other hand, is bound quietly to yield possession to his landlord, although he still retains a reasonable right of egress and regress, for the purpose of removing his goods and chattels. He may also in certain cases, as we shall see presently, have a right to take the emblements or annual profits of the land after they shall have matured; and, in any event, unless restricted by some positive agreement to the contrary, may remove such fixtures as he has erected during his occupation, for his comfort, convenience or profit. We shall, in this chapter, treat of each of these subjects in their order.

SECTION I.

THE LIABILITY OF A TENANT HOLDING OVER.

§ 524. As soon as the tenancy has expired, by its own limitation, the tenant ought peaceably and quietly to surrender the premises, with all such improvements, buildings, and fixtures as belong to

¹ *Rex v. Smith*, 1 Mood & R. 155, per *Ld. Tenterden*; *Commonwealth v. Haley*, 4 Allen, 318; *Taunton v. Costar*, 7 T. R. 431; *Newton v. Harland*, 1 M. & G. 664, per *Coltman, J.* An indictment lay at common law before the statutes of forcible entry and detainer, but title was a good defence. 1 Hawk. P. C. 495 (8 ed.). By statutes 5 & 15 Rich. II.; 8 Hen. VI.; and 21 James I. forcible entry and detainer, even by one having title, was indictable and restitution awarded on conviction. *Ib.* Tres-

pass for assault was also maintainable by the tenant if undue force was used. *Sampson v. Henry*, 11 Pick. 379; but not trespass *quare clausum* for the violent entry. *Same v. Same*, 13 *id.* 86; *Meador v. Stone*, 7 Metc. 147; *Ives v. Ives*, 13 Johns. 235. If the term had not ended the landlord is liable in trespass for his entry, though the tenant had removed. But if no actual damage or malice is shown, only nominal damages are awarded. *Shannon v. Burr*, 1 Hilt. 39.

them;¹ and his refusal to do so, will, without any notice to quit render him liable to certain penalties imposed by law; and after entry or demand to be treated as a trespasser.² If he has let the whole or any part of the premises, to an under-tenant, who is in possession at the termination of the lease, he must get him out; otherwise, he will not be in a situation to render that complete possession to which the landlord is entitled. And unless the entire possession is delivered up, the tenant's responsibility for rent will not cease, although it may have become impossible for the tenant to give the landlord full possession, in consequence of the obstinacy or ill-will of an under-tenant, to whom he has let a part or the whole of the premises, and who refuses to quit; for in such case the landlord may refuse to accept the possession, and hold the original tenant liable.³ Where an under-tenant held over after the expiration of a term, against the will of the lessee, and, during the holding over, the lessee distrained for rent previously due; it was held, that the lessee was liable for rent during the period of the holding over, but not for a whole year's rent, as a tenant who holds over does not necessarily become a tenant from year to year.⁴ The landlord may, however, in such case, discharge the original lessee, by accepting the under-tenant as his immediate lessee; as by accepting the key from the original tenant whilst the under-tenant is in possession, or by accepting rent from him, or by any other act tantamount to it. But the mere circumstance of the landlord signing a notice, by which a tenant, whose term has expired, orders his under-tenant to pay the rent to him in future, is not evidence of his agreement to accept him as a tenant, unless it appears that he knew and understood the contents of the notice.⁵ And whenever a tenant remains in possession, it is a question for the jury to determine whether he intends to continue the tenancy.⁶

¹ The word "improvement," as used in a lease, embraces every addition, alteration, erection, or annexation made by the lessee during the term for his own use. It is more comprehensive than the word "fixtures," which is necessarily included in it. *French v. The Mayor*, 16 How. Pr. R. 220.

² *Dorrell v. Johnson*, 17 Pick. 233; *Taunton v. Costar*, 7 T. R. 481; *Turner v. Meymott*, 1 Bing. 158. What the landlord's rights to repossession are, if resisted, will be fully stated hereafter. See §§ 581, 582, *post*, and notes. In Louisiana, where

a landlord, instead of resorting to the means provided by law for obtaining possession of his premises, takes upon himself without authority, to turn out the tenant and his family, he will be liable in damages, and it will be no excuse for him that the removal was effected without violence or inquiry. *Thayer v. Littlejohn*, 1 Rob. La. 140.

³ *Harding v. Crethorn*, 1 Esp. 57.

⁴ *Ibbs v. Richardson*, 9 A. & E. 849; *Waring v. King*, 8 M. & W. 571.

⁵ *Harding v. Crethorn*, *supra*.

⁶ *Jones v. Shears*, 4 Ad. & E. 882.

§ 525. A tenant at will becomes a trespasser by any unreasonable delay to remove from the premises, after his estate is determined : and a tenant for years may be so treated immediately after his term has ended ;¹ although trespass will not lie against a tenant at sufferance, before actual entry by the landlord.² But in addition to the common-law liabilities, there are statutory penalties which a tenant will incur by his neglect or refusal promptly to surrender possession. The statutes of 4 Geo. II. c. 28, and 11 Geo. II. c. 19, declared that if a tenant held over, after demand made and notice in writing to deliver up possession, or if he held over after having himself given notice of his intention to quit, he should be liable to pay double rent so long as he continued to hold over. The provisions of these statutes have been re-enacted in New York, though they are not generally adopted in this country.³ The statutes referred to declare,⁴ that if any tenant for life, or for years, or any other person who may have come into possession of any lands or tenements, under or by collusion with such tenant, shall wilfully hold over any lands or tenements after the expiration of the term, and, after demand made and one month's notice in writing, given in the manner therein prescribed, requiring the possession thereof by the person entitled thereto, the person holding over shall pay to the person kept out of possession, or his representatives, at the rate of double the yearly value of the lands and tenements so detained, for so long a time as he shall hold over, or keep the person entitled out of possession. This statute does not apply to a mere weekly or monthly tenancy, but to a tenancy for life or years only.⁵ And it applies only to cases in which the tenant has been guilty of fraud or contumacy, and not to those in which he maintains possession *bond fide*, or upon any fair ground of defence.⁶ Therefore, where there had been a treaty for a further term between the landlord and tenant, which afterwards fell through, the tenant who had held over during the treaty was adjudged not to be within the meaning of the statute.⁷

§ 526. A demand of possession, and notice to quit, in writing, are necessary in all cases in which the landlord would avail himself of the statute ; for though, where premises are underlet for a certain definite period, no notice is required to put an end to the

¹ *Ellis v. Paige*, 1 Pick. 43 ; *Danforth v. Sargeant*, 14 Mass. 491.

² *Rising v. Stannard*, 17 Mass. 282.

³ *Kent, Com.* 115.

⁴ 1 R. S. 745, § 10.

⁵ *Lloyd v. Roebee*, 2 Camp. 453.

⁶ *Hall v. Ballentine*, 7 Johns. 586.

⁷ *Wright v. Smith*, 5 Esp. 208.

tenancy, yet the tenant who holds over beyond that term can only be charged for double rent from the time when a notice was served.¹ But proof of service of notice to quit in writing is held to be a sufficient proof of demand ;² and, where the holding has been from year to year, the ordinary notice to quit, which is given for the purpose of determining the tenancy, serves, at the same time, as a good demand of possession under the statute.³

§ 527. An action lies in favor of the landlord, as well as of his legal representatives ; and if the parties entitled to the action are tenants in common, each may bring a separate action for the double value of his moiety ;⁴ but they cannot sue jointly where there has been no joint demise.⁵ The statute requires notice to be given to the tenant in possession ; and the rules relating to service of notice to quit, formerly mentioned, are applicable here. If the notice is given to a single woman as the tenant, and she afterwards marries, the landlord may maintain his action for double rent against her husband, without serving another notice on him.⁶

§ 528. The notice ought to be given before the expiration of the term, and the landlord will then be entitled to recover double rent, as from the period at which the term expired.⁷ It may, however, be given after the expiration of the term ; and, if the landlord has done no act acknowledging the continuance of the tenancy, he will be entitled to double rent or value from the time of demand, so long as the tenant continues to hold over. But if the rent is payable quarterly, and the demand be made in the middle of a quarter he cannot recover single rent for the antecedent fraction of such quarter.⁸ If, after the expiration of the notice, the landlord receives single rent from his tenant, it is a question for a jury to consider whether he did not thereby intend to waive the notice and re-establish the tenancy ; for, in that case, the landlord's right to sue for double rent is gone.⁹ But the bringing of an ejectment suit, after service of notice to quit, is no waiver of the landlord's right to double rent.¹⁰

§ 529. The statute also imposes a penalty upon such tenants as, having the power of terminating their leases by notice, shall notify

¹ *Cobb v. Stokes*, 8 East, 858.

² *Wilkinson v. Colley*, 5 Burr. 2694 ;
Poole v. Warren, 8 Ad. & E. 582.

³ *Hirst v. Horn*, 6 M. & W. 898.

⁴ *Cutting v. Derby*, 2 W. Bl. 1077.

⁵ *Wilkinson v. Hall*, 1 Bing. N. C. 718.

⁶ *Lake v. Smith*, 4 B. & P. 174.

⁷ *Cutting v. Derby*, 1 W. Bl. 1075.

⁸ *Cobb v. Stokes*, *supra*.

⁹ *Doe v. Batten*, Cowp. 248 ; *Ryal v. Rich*, 10 East, 48.

¹⁰ *Soulsby v. Neving*, 9 East, 810.

the landlord to that effect, and afterwards refuse to deliver up possession at the time specified. It declares that, if any tenant shall give notice of his intention to quit the premises by him holden and shall not accordingly deliver up the possession thereof at the time specified, the tenant, his executors, or administrators, shall from thenceforward pay to the landlord, his heirs, or assigns double the rent which he should otherwise have paid, to be levied, sued for, and recovered at the same time, and in the same manner, as the single rent; and such double rent shall be continued to be paid during all the time the tenant shall continue in possession.¹ As this statute directs the double rent to be recovered in the same manner as single rent, the landlord may either bring an action of debt for it or he may distrain. A mere verbal lease is considered to be within the meaning of this statute; and verbal notice to quit, by the tenant, is sufficient to make him liable for double rent, in case he holds over.² But, to bring the tenant under the statute, his notice must be direct and positive; for in a case where a tenant gave his landlord notice that he would quit upon a contingency, *as soon as he could find another situation*, and he did afterwards find another situation, but neglected to quit the premises; Lord Ellenborough held the notice too vague, and that the case did not come within the statute.³ The statute only applies to those cases in which the tenant has the power of determining his tenancy by notice, and where he actually does give a *valid notice* for that purpose.⁴ It may also be observed, that a tenant holding over, after notice to quit on his part, is only liable for double rent during his continuance in possession; and need not give a fresh notice, after having once paid double rent, in order to get rid of his liability.⁵ The chief difference between these two sections of the statute seems to be, that in the former the notice which proceeds from the landlord must be in writing; but in the other, proceeding from the tenant, it may be a mere verbal notice; and that the one imposes double rent as a *penalty* and not as *rent*; while the other still treats the party as tenant, and recognizes him by that name, which the former does not.⁶

§ 530. In addition to the penalty of double rent, imposed upon

¹ 1 N. Y. R. S. 745, § 11.

² *Timmins v. Rowlinson*, 8 Burr. 1608; *Wheeler v. Copeland*, 5 T. R. 364; *Sullivan v. Bishop*, 2 C. & P. 359.

³ *Farrance v. Elkington*, 2 Camp. 591.

⁴ *Johnstone v. Huddlestons*, 4 B. & C. 922; 7 D. & R. 411.

⁵ *Booth v. Macfarlane*, 1 B. & Ad. 904.

⁶ *Soulsby v. Neving*, 9 East, 814.

the tenant for holding over, the same statute also subjects him to an action for all special damages which the landlord may sustain in consequence of his refusal to deliver possession, by enacting that the tenant "shall also pay and remunerate all special damages whatever, to which the person so kept out of possession may be subjected by reason of such holding over; and there shall be no relief in equity against any recovery had at law under this section."¹ There is likewise, in this State, a further provision against holding over, without express consent, after the determination of their particular estates by guardians, trustees to infants, and husbands seised in right of their wives, or by any other persons having estates determinable upon any life or lives. They are declared to be trespassers, and liable for the full value of the profits received during the wrongful possession.² This last provision was taken from the statute of 6 Anne, c. 18; but the common law itself held the guardian, in such case, to be an abator, and gave an assize of *mort d'ancestor* against the disseisor; with an action of trespass against the tenant *pour autre vie* or tenant for years holding over.³

SECTION II.

MUTUAL PRIVILEGES AFTER DISSOLUTION.

§ 531. By the common law, the owner, having a right to immediate possession, might enter and repossess himself by force if resisted, and if indicted for breach of the peace, might justify under his title, except for undue or excessive force.⁴ By the statutes of forcible entry and detainer this defence to an indictment was taken away, but the right of forcible repossession still existed civilly, and the landlord, though indictable, could not be sued in trespass by his tenant holding over whom he had entered upon and ejected without excessive force.⁵ But the correctness of this doctrine was denied in some later cases, and it was declared that a lessor could, if resisted, neither forcibly enter nor expel the tenant, who was in without right; because by the statutes of forcible entry and detainer the act was criminal and

¹ 1 R. S. 745, § 10.

² *Ib.* 749, § 7.

³ 4 Kent, Com. 116.

⁴ 1 Hawk. P. C. 495 (8 ed.).

⁵ *Taylor v. Cole* 3 T. R. 292; *Taunton*

v. Costar, 7 *id.* 481; *Argent v. Durant*, 8 *id.* 408; Co. Lit. 257 a, Butler's note; *Per Redfield, J., Dustin v. Cowdrey*, 23 Vt. 631, 635; *Turner v. Meymott*, 1 Bing. 158; *Butcher v. Butcher*, 7 B. & C. 899.

hence could confer no rights at law nor reinvest the landlord with a legal possession, and for such violent entry he was liable to the tenant in trespass *quare clausum*, since the latter's possession had never been legally determined.¹ Or, if the landlord had peaceably entered, his forcible expulsion of the tenant rendered him a trespasser *ab initio*, and equally liable to action by the latter.² But this doctrine has since been overruled in both points, and the law established in accordance with the views first stated. The forcible entry of the lessor is held justifiable under a plea of title; and having once reinvested himself with the legal possession by his entry, he may treat the tenant as a trespasser, and, if resisted, expel him with reasonable force.³

§ 582. In America, the law seemed well settled in most of the States, in accordance with this doctrine of the common law; and the right of the landlord forcibly to enter and expel the tenant who held over after the conclusion of his term or the expiration of a notice to quit, subject only to indictment under the statutes, generally established.⁴ But in some States the law of *Hillary v. Gay* and *Newton v. Harland* was adopted, and the rule laid down that the lessor, if resisted in his entry or removal of the tenant's goods, must desist and

¹ *Hillary v. Gay*, 6 C. & P. 284; *Newton v. Harland*, 1 M. & G. 644.

² *Ibid.*

³ *Harvey v. Brydges*, 14 M. & W. 437, 442. "I should have no difficulty in saying that where a breach of the peace is committed by a freeholder who in order to get into possession of his land assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for forcible entry, he is not liable to the other party also. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." Per Parke, B., quoted and approved in *Blades v. Higgs*, 10 C. B. N. s. 718, 721; and this doctrine was followed and established in *Davis v. Burrell*, 10 C. B. 825; *Pollen v. Brewer*, 7 C. B. N. s. 371; *Kavanagh v. Gudge*, 7 M. & G. 316; *Davison v. Wilson*, 10 Q. B. 890, 902; *Burling v. Read*, *ib.* 904; *Meriton v. Coombs*, 1 Lowndes, M. & P. 510. So *Woodfall, Landl. & T.* 575 (9 ed.). It may be remarked further that *Hillary v. Gay* was a *nisi prius* case, and *Newton v. Harland* affirmed by a divided court.

⁴ *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 *id.* 235, "It is well settled that a person having title, that is, a right to enter, is not liable to an action of trespass for entering with force, although liable to indictment for forcible entry." "This position, apparently harsh, and tending to public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land. Statutes of forcible entry and detainer punish criminally the force, and in some cases make restitution of possession, but so far as civil remedy goes, there is none whatever." Per Nelson, C. J., *Jackson v. Farmer*, 9 Wend. 201; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Jackson v. Morse*, 16 Johns. 197; *Overdeer v. Lewis*, 1 W. & S. 90; *Tribble v. Frame*, 7 J. J. Marsh. 599; *Sampson v. Henry*, 13 Pick. 36; *Curl v. Lowell*, 19 *id.* 25. *Miner v. Stevens*, 1 Cush. 482, 485; *Meador v. Stone*, 7 Metc. 147; *Curtis v. Galvin*, 1 Allen, 215; *Mason v. Holt*, *ib.* 46; *Moore v. Mason*, *ib.* 407; *Mugford v. Richardson*, 6 *id.* 76; *Pratt v. Farrar*, 10 *id.* 519, 521; *Livingston v. Tanner*, 14 N. Y. 64; *Walton v. File*, 1 Dev. & B. 567; *Johnson v. Hannahan*, 1 Strobl. 313. In *Rich v. Keyser*, 54 Pa. St. 86, it is said, the lessor may expel if there is no breach of the peace. But this was a *dictum* merely.

have recourse to his legal remedies for possession; and that if he persisted, the tenant might have trespass *quare clausum* against him as well as trespass for assault.¹ This doctrine, undoubtedly, obtained acceptance more from its apparently securing a resort to legal measures instead of physical force, than because it was in consonance with well established principles or sound authority;² and how far the return of the English law to its former basis and the repudiation of the cases on which this doctrine rested, will control the decisions of the American courts which maintained it, remains to be seen.³ It is well settled, however, that a right to re-enter forcibly, and expel the lessee, may be conferred by the lease in express terms.⁴

§ 533. After the tenant has quit possession, and his tenancy is ended, he has still a right to go upon the land, in order to remove his goods and utensils.⁵ But he can then take away such articles

¹ *Dustin v. Cowdrey*, 28 Vt. 681; and see *Moore v. Boyd*, 24 Me. 242; in *Paige v. DePuy*, 40 Ill. 506, 510; *Reeder v. Purdy*, 41 id. 279; the court, considering the authorities to conflict, adopt the rule in *Dustin v. Cowdrey*, *supra*. In this case, which was elaborately considered, the court proceed upon two grounds: first, that, as was suggested in *Newton v. Harland*, a forcible entry being criminal under the statutes, could not invest the lessor with a lawful possession; and, secondly, that restitution being also directed by these statutes the lessor had acquired no title to possession. But the first consideration is fully controverted by the authorities above cited; and seems to have arisen from confounding the distinction between a *malum prohibitum* and a *malum in se*; and the second seems founded on the mistaken view that an action of trespass would lie because restitution was enforceable, whereas this was only by a proceeding for forcible entry, and after a conviction which no tribunal could anticipate, and impugn the lessor's title. How, moreover, one wrongfully holding possession could maintain an action as if lawfully possessed, the court do not explain. It is noticeable, also, that a very different doctrine was laid down by the same court in *Beecher v. Parmele*, 9 Vt. 352. "It was formerly considered that the proprietor of land who found an intruder in quiet possession of the same must resort to his legal remedy, and could not forcibly expel such wrong-doer. But it is now well settled that such intruder may be forcibly expelled, so far as the land is concerned. If the owner is guilty of a breach of the

peace and trespass on the person of the intruder, in so doing he is liable for that, but his possession is lawful." And in a later case, *Mussey v. Scott*, 32 Vt. 82, the court admit that a violent entry may be made by the landlord, at least where the possession is vacant. In Missouri, the true distinction is drawn, and restitution is enforceable under the statutes of forcible entry, &c., but no action lies by the tenant. *Krevet v. Meyer*, 24 Mo. 107; *Fuhr v. Dean*, 26 id. 116.

² 4 Kent, Com. 116.

³ A modified form of the same rule prevails to some extent, that, while a forcible entry is actionable as well as indictable if the lessee is present, the lessor may enter with force in the lessee's absence, and, being in, may use all reasonable means to remove the tenant's goods or defend the possession. *Todd v. Jackson*, 2 Dutch. 525; *Mussey v. Scott*, 32 Vt. 82; but see *Brock v. Berry*, 81 Me. 293, 296; *Larkin v. Avery*, 23 Conn. 304, *contra*. If undue force is used, the lessor becomes a trespasser *ab initio*. *Whitney v. Swett*, 2 Fost. 10.

⁴ *Feltman v. Cartwright*, 7 Scott, 695; *Fifty Assoc. v. Howland*, 5 Cush, 214; *Page v. DePuy*, 40 Ill. 506; and if this right may be exercised when conferred by contract it cannot be in itself illegal, for no contract can justify the commission of an act which is *malum in se*, and hence is valid to vest possession even when not contracted for, the liability to indictment not rendering it inoperative civilly, but merely penal criminally.

⁵ 2 Bl. Com. 14; *Ellis v. Paige*, 1 Pick. 43. Where a landlord agreed to

of personal property only as are detached from the freehold ; for such fixtures as the law permits the tenant to remove must be removed before the expiration of the tenancy.¹ Yet a tenant at will, when his interest is determined by a demand of possession on the part of the landlord, has no right to continue his possession for even a reasonable time to remove his goods ; though it seems he may enter to remove them, if he does not exclude the landlord.² A landlord who leases to a cropper for the year, to receive part of the grain as rent, has a lien upon the growing crop ; and it cannot be removed by the tenant, or those acting under him, until the rent is provided for.³ So also where a tenant agrees to cultivate and bag the hop crop for the year, in payment of rent, the property in the hops is in the landlord, beyond the control of the tenant.⁴ Where, in a lease executed by both parties, a covenant was contained that on the lessee's being removed from the demised premises, or dispossessed, he should be paid the value of the buildings and improvements made by him ; and that, on such payment being made, he should yield the possession ; an agreement by the lessor will be implied, that the lessee may retain possession until such payment is made, notwithstanding the term for which the premises were demised has expired.⁵ In no case, however, has a tenant in common a lien upon the premises for advances made by him, for the purpose of making permanent improvements thereon, except by express agreement.⁶ It may be observed, also, before leaving this part of our subject, that, on the expiration of a lease, whether by forfeiture, lapse of time, or otherwise, the lessor is not enti-

allow his tenant a reasonable time after the expiration of the lease, to remove his buildings, and the tenant forfeited his lease before the expiration of the term, the intention of the parties must be confined to its legal expiration, and not to the wrongful act of the lessee in terminating it, and the lessee can claim no right under it. *Whipley v. Dewey*, 8 Cal. 86.

¹ *Fitzherbert v. Shaw*, 1 H. Bl. 258.

² *Doe v. Jones*, 10 B. & C. 718.

³ *Case v. Hart*, 11 Ohio, 864.

⁴ *Kelley v. Weston*, 20 Me. 232.

⁵ *Van Rensselaer's Heirs v. Penniman*, 6 Wend. 569. Where a lease for a term of years contains a covenant on the part of the landlord, that, at the expiration of the term, the tenant shall be paid the appraised value of a dwelling-house to be erected by him on the demised premises, or that a new lease for the same term of

years, at an appraised rent (excluding from the appraisal, the value of the dwelling-house), shall be granted to him ; the tenant, at the expiration of the term, is entitled to retain the possession, until the covenant shall be performed by the landlord or his representatives. The tenant so retaining possession is not however discharged from the payment of rent, but is subject to the general rule that a tenant holding over after the expiration of his lease, with the landlord's consent, becomes a tenant from year to year, on the terms of the original lease. The landlord is equally bound by the same rule, and can recover no more than the original rent reserved. He is not entitled to an increased rent proportioned to the increased value of the premises. Per *Duer, J., Holsman v. Abrams*, 2 Duer, 436.

⁶ *Taylor v. Baldwin*, 10 Barb. 582.

tled to have the indenture of lease returned to him by the lessee, who has executed a counterpart, but each party may continue to hold his part of the lease.¹

SECTION III.

TENANT'S RIGHT TO EMBLEMENTS.

§ 534. A tenant for life, or his representatives and under-tenants, as well as a tenant from year to year or at will, is entitled to *emblements*; which is, a right to take and carry away, after his tenancy has ended, such annual productions of the soil, as are raised by his labor; as corn hops, flax, roots, and the like.² But this right does not extend to such things as are not of annual growth, and do not require the labor of the tenant, but are the permanent and natural product of the earth, such as trees, fruit, grass, &c.³ Nor does it extend to a crop which does not ordinarily repay the labor by which it is produced, within the year in which that labor is bestowed; and has, therefore, been held not to include a second crop of clover, although the first crop, taken at the end of the term, did not repay the expense of cultivation.⁴ This privilege is allowed to tenants for life, at will, or from year to year, because of the uncertain nature of their estates, and lest they should be deterred from the proper cultivation of their lands; and the general rule upon this subject is, that if the term is so uncertain, that the tenant at the time he sows his crop, cannot know that his tenancy will continue until he shall have reaped it, he will be entitled to the crop as emblements. But if his term is certain, and does not depend upon a contingency, so that, at the time he sows the crop, he may know that his term will not continue until he shall have reaped it, he will not be entitled to it, as emblements.⁵ He may, however, sometimes claim it as an offgoing crop, or the value of it, by express

¹ Hall v. Ball, 3 Scott, N. R. 577.

² Bevan v. Briscoe, 4 Har. & J. 189; Graves v. Weld, 5 B. & Ad. 118; Clark v. Harvey, 64 Pa. St. 142. Grain sown one year and harvested the next is the issues and profits of the year in which it is harvested. Lambert v. Stouffer, 55 Pa. St. 284; and the rent of the cropper being a portion of the crop, falls due, and is pay-

able only when the crop is harvested. *Ibid.*

³ Knevitt v. Pool, Cro. El. 468; Co. Lit. 55, b; Latham v. Atwood, Cro. Car. 515.

⁴ Graves v. Weld, *supra*; Whitmarsh v. Cutting, 10 Johns. 360.

⁵ Kingsbury v. Collins, 4 Bing. 202; Bain v. Clark, 10 Johns. 424.

stipulation with his landlord, or by the custom of the country, if such custom exists.

§ 535. This privilege is extended, also, to all cases where the tenancy has been unexpectedly determined without the tenant's fault; or in legal phraseology has been *put an end to by act of God or the law*. Thus, if a tenant for life dies before harvest time and his estate comes to an end, that is an act of God, and his executors will be entitled to the crop. So, if a lease be made to a husband and wife so long as they continue husband and wife, and they are afterwards divorced, the tenancy being dissolved by an act of the law, the husband may enter upon the land, and exercise this privilege.¹ The same rule holds where a tenancy is terminated by the act of the landlord, or by a notice to quit proceeding from him.² But it is entirely different where the tenancy is put an end to by the act of the tenant himself; for in such case he has no right to take away any of the productions of the land after his tenancy ends.³ This is also the case, if he is guilty of a breach of any condition in his lease which forfeits the lease; or holds for a certain term, subject to be defeated upon a particular event, and such event is brought about by act of the tenant; as if land be leased to a widow for twenty years, provided she remain a widow so long, and she marries, and so terminates the tenancy by her own act.⁴

§ 536. But this right *never exists where the tenancy is for years* to be determined at the expiration of a certain period; for if in such case, the tenant, with his eyes open, sows corn which he knows cannot become ripe until after the expiration of his lease, the law will afford him no relief.⁵ Although no indulgence is given

¹ Oland's case, 5 Co. 116, a. If a person in possession of land under a judgment in a writ of entry, sow the land pending a writ of right against him, in which judgment is recovered against him, and seisin is obtained before a severance of the crop, the demandant in the writ of right is entitled to it. *King v. Fowler*, 14 Pick. 238. So, also, if the land was sowed by the grantee of the party recovering in the writ of entry. *Ib.*

² *Oland v. Burdwick*, Cro. El. 460. In the lease of a farm for six years, it was agreed that either party might terminate the lease by giving six months' notice to the other; but if the lessor gave the notice, he was to allow the lessee a compensation for preparing the ground for seed, &c., it was held that if the lessor gave the

notice after the seed had been put into the ground, the lessee was entitled to the emblements. *Stewart v. Doughty*, 9 Johns. 108.

³ *Debow v. Titus*, 5 Halst. 123; *Bulwer v. Bulwer*, 2 B. & A. 470.

⁴ *Wicks v. Jordan*, 2 Bulst. 213; *Oland's case*, *supra*; *Davis v. Eyton*, 7 Bing. 154; *Bulwer v. Bulwer*, *supra*; *Debow v. Titus*, *supra*.

⁵ Co. Lit. 55; *Davies v. Connop*, 1 Price, 53; *Bain v. Clark*, *supra*; *Whitmarsh v. Cutting*, *supra*. But where the lease though for a term is silent as to who shall have the crop, and the rent is equal for each year, and the tenant's right to sow is recognized, he is entitled to the crop. *Kelly v. Todd*, 1 West Va. 197.

in such cases, to tenants themselves; yet it has been extended to under-tenants who have not participated in destroying the estate.¹ Where, therefore, a tenant for years, whose lease depended on a certain condition, underlet the land, and his under-lessee sowed corn, and afterwards the first tenant broke the condition, and so forfeited the lease, by means of which they were all ousted; the under-tenant was, nevertheless, allowed to enter and cut the corn when it was ripe.² So, also, if the determination of an estate for years depends upon an uncertain event; when that event happens, and the estate shall consequently come to an end, the tenant will be entitled to the crops growing on the land.³ Gardeners and nurserymen, also, for the benefit of trade, after the expiration of the lease, may remove trees, shrubs, &c., planted by them with an express view to sale.⁴ Generally, where a tenant sows the land and dies, his executors shall have the emblements; but there is an exception to this rule, for if he sows the land and dies, though the property of the corn is in the executors, it is subject to this condition, that if the heir assign to the widow the land sown, for her dower, she shall have the corn; for she shall be in, says Lord Coke, *de optima possessione viri*, above the title of executor.⁵

§ 537. The common law, however, made a distinction between the right of emblements, and the expense of ploughing and manuring the ground. The determination, by the landlord of an estate at will, will give the lessee his emblements, provided the lease is determined after the crop is actually in the ground. But if the ouster occurs before the seed is sown, the tenant is not entitled to the crop, nor to compensation for ploughing and manuring the land.⁶ And if the tenant during his occupation, by his labor annexes to the farm part of the waste land formerly unsubdued, it will enure

¹ Doe v. Witherwick, 8 Bing. 11; Bevens v. Briscoe, 4 Har. & J. 189.

² Oland v. Burdwick, Cro. El. 460; Bevens v. Briscoe, *supra*.

³ Co. Lit. 50, a; Knevitt v. Poole, Cro. El. 468; Kingsbury v. Collins, 4 Bing. 207.

⁴ Penton v. Robart, 2 East, 90; Lee v. Risdon, 7 Taunt. 191. Emblements may be claimed in hemp, flax, saffron, and the like; in melons and potatoes; and in hops, although they spring from old roots, because they are annually manured and require cultivation. Latham v. Atwood, Cro. Car. 515; Evans v. Roberts, 5 B. & C. 882. Growing grass, however,

even if grown from seed, cannot be taken; for although it may be increased by cultivation, it cannot be sufficiently distinguished from the mere natural product of the soil. Co. Lit. 56, a; 1 Roll. Abr. 728. But it appears to be otherwise with respect to artificial grasses, such as clover and the like. 4 Burn's Eccl. Law, 410.

⁵ 2 Inst. 81.

⁶ Stewart v. Doughty, *supra*; 4 Kent, Com. 108; Putnam v. Richie, 6 Paige, 390-408. It is said that the right to emblements does not attach until the seed is sown; preparing the land for the reception of the seed does not confer it. Price v. Pickett, 21 Ala. 741.

to the benefit of the landlord, without compensating the tenant.¹ A mortgagee, as against the mortgagor, and his grantees, has the paramount right; and, therefore, a lessee of the mortgagor, under a lease executed subsequent to the mortgage, is not entitled, as against the mortgagee, to crops growing on the mortgaged premises, at the time of the foreclosure and sale of said premises; and the mortgagee, becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops.²

§ 538. The reason of the rule, which allows the usual emblements to a tenant for life or at will, very properly excludes a tenant for years from the exercise of this privilege; he must suffer the consequences of his own folly, if, with a full knowledge of the period when he will be obliged to quit, he sows what he knows he cannot reap. But, by the custom of the country in particular districts, he will be allowed to re-enter and cut the corn which he has sown after his lease has run out.³ Every demise, in respect to matters of which the parties are silent, is open to explanation by the general usage and custom of the country or district where the land lies; and every person, says Mr. Justice Story, under such circumstances, is supposed to be cognizant of the custom, and to contract with reference to it.⁴ Upon this principle, a tenant for years in Pennsylvania, according to the custom of that State, is entitled to the away-going crop; that is, to grain sowed in the autumn before the expiration of the lease, and coming to maturity in the summer after the lease is determined.⁵ The same custom was said, by Chief Justice Kirkpatrick, to be well established in New Jersey.⁶

¹ *Doe v. Murrell*, 8 C. & P. 184.

² *Lane v. King*, 8 Wend. 584, and see *Mayo v. Fletcher*, 14 Pick. 580.

³ *Wigglesworth v. Dallison*, Doug. 201; *Boraston v. Green*, 16 East, 71; *Holding v. Pigott*, 7 Bing. 465.

⁴ *Van Ness v. Pacard*, 2 Pet. 188; *Stultz v. Dickey*, 5 Binn. 285.

⁵ *Demi v. Bosler*, 1 Penn. 224; *Iddings v. Nagle*, 2 W. & S. 22; *Briggs v. Brown*, 2 S. & R. 14. In the first case, Judge Huston says, the tenant has a right to enter and remove what is called the away-going crop, which heretofore has been held to be grain sown in the autumn to be reaped the next harvest; and no difference has yet been established between a tenant who pays a rent in money, and one who pays a share of the produce of the farm. It is understood a tenant for a year is to take one crop of each kind of grain culti-

vated, and that he is to mow as many crops of grass as the meadows will produce. This right need not be reserved in the lease; and after the expiration of the term, the tenant may enter to gather the crop, or may maintain trespass against the lessor, or his vendee, if they cut it. And see *Briggs v. Brown*, *supra*. Agricultural leases in the States mentioned in the text generally begin in the spring, either in the end of March or the beginning of April; and the tenant whose lease expires in the spring may sow grain the autumn previous, to be cut the harvest after his tenancy expires; but if he puts in the spring crop, oats for instance, before he leaves, he is not entitled to reap it, but loses it, unless by express contract.

⁶ *Van Doren v. Everitt*, 2 South. 460. So in Ohio. *Foster v. Robinson*, 6 Ohio St. 90.

And in Delaware it exists as to wheat, but not as to oats.¹ For a similar reason, in an action by a tenant against his landlord for compensation for seed and labor, under the denomination of *tenant-right*, it has been held, that, although there was a written contract between them, the custom of the country would still be binding, if it is not inconsistent with the terms of the contract; for that not only all common-law obligations, but those imposed by custom, were in full force where the contract did not vary them.²

§ 539. But *evidence of usage*, though admissible to add to or explain, is never permitted to vary or contradict, either expressly or by implication, the terms of a written instrument. And therefore where a tenant covenanted, on quitting the land, not to sell or take away the manure, but to leave it to be expended by the succeeding tenant, it was determined to exclude the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it.³ It was contended, says Lord Lyndhurst, delivering the judgment of the court in this case, that the stipulation to leave the manure was consistent with the tenant's not being paid for what was left, and that the custom to pay for the manure might be ingrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part.

§ 540. *The general rule on this subject is*, that where there has been a contract, about a matter concerning which there is an established custom, this custom is reasonably to be understood as forming part of the contract, and may be referred to, to show the intention of the parties, in those particulars which are not expressed in the contract.⁴ But if the meaning of the contract is certain and

¹ *Templeman v. Biddle*, 1 Harringt. 522.

² *Senior v. Armytage*, Holt, 197. See also *Webb v. Plummer*, 2 B. & A. 750; *Hutton v. Warren*, 1 M. & W. 466; *Magee v. Atkinson* 2 *id.* 442; *Blackett v. Royal Ex. Co.* 2 Tyrw. 266.

³ *Roberts v. Barker*, 1 Cr. & M. 808; *Reading v. Menham*, 1 Mood. & R. 236.

⁴ *Hinton v. Locke*, 5 Hill, 437; *Wadsworth v. Allcott*, 6 N. Y. 64; *Sewall v.*

Gibbs, 1 Hall, 602; *Connor v. Robinson*, 2 Hill (S. C.), 854; *Wilcox v. Wood*, 9 Wend. 349. Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation, by the general usage or custom of the country, or of the district where the land lies. Per Story, J., in *Van Ness v. Pacard*, 2 Pet. 148. Evidence of usage is allowed to annex incidents to written contracts in matters with respect to

beyond doubt, usage cannot be admitted to vary or contradict it.¹ The usage, however, to be admissible, must be proved to be known to the parties, or be so general and well established, that knowledge and adoption of it may be presumed. Such proof must be by evidence of facts, and not of mere opinions; by means of witnesses who have had frequent and actual experience of the custom, speaking from particular instances within their own knowledge.² The custom must also be certain and uniform.³ And the rule must be stated with this further qualification, that usage is never admissible to oppose or alter a general principle or rule of law, and, upon a fixed state of facts, to make the legal rights and liabilities of the parties other than they are by the common law.⁴ But in order to constitute such a custom, or, more properly speaking, such a usage, as is binding on the tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage, applicable to farms of a similar description.⁵

§ 541. *If a farm is leased for agricultural purposes*, good husbandry, which, without any stipulation therefor, is implied by law, requires that the manure made upon it the last year of the tenancy should be left by the tenant to his successor; if rented for other purposes, this conclusion might not follow.⁶ The practice and

which they are silent; *Hutton v. Warren*, 1 M. & W. 476; *Legh v. Hewitt*, 4 East, 154. In *Wigglesworth v. Dallison*, Doug. 201, the tenant was allowed an away-going crop, although there was a formal lease under seal. The custom, says Lord Mansfield, does not alter or contradict the agreement in the lease: it only superadds a right, which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease.

¹ *Macomber v. Parker*, 18 Pick. 175. Evidence of custom will be excluded where the written agreement is expressly or impliedly inconsistent with it. *Roberts v. Barker*, 1 Cr. & M. 808.

² *Mills v. Hallock*, 2 Edw. 652. The true test of a usage is its having existed a sufficient length of time to have it become generally known, and to warrant a presumption that contracts are made in reference to it. *Per curiam*, in *Smith v. Wright*, 1 Caines, 48.

³ *Stevens v. Reeves*, 9 Pick. 198; *Collings v. Hope*, 3 Wash. C. C. 149; *Chastain v. Bowman*, 1 Hill (S. C.), 270; *Wood v. Hickock*, 2 Wend. 501; *Dawson v. Kittle*, 4 Hill, 107. To be uniform, it must have been constantly observed in the same manner. *Wood v.*

Wood, 1 C. & P. 59; *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254; *Rapp v. Palmer*, 3 Watts, 178. And a local usage cannot vary the construction of a contract, unless it is proved that its existence was known to the parties, and that their contract was made in reference to its terms. *Wheeler v. Newbould*, 5 Duer, 29; affirmed, 16 N. Y. 392.

⁴ *Frith v. Barker*, 2 Johns. 327; *Cole v. Goodwin*, 19 Wend. 251; *Story v. Bliss*, 6 Metc. 393; *Bryant v. Com. Ins. Co.*, 6 Pick. 181; *Henry v. Risk*, 1 Dall. 285; *Stoever v. Whitman*, 6 Binn. 416; *Bartlett v. Pentland*, 10 B. & C. 760.

⁵ *Dalby v. Hirst*, 1 Brod. & B. 224; *Webb v. Plummer*, 2 B. & A. 746; *Thorpe v. Eyrie*, 3 Nev. & M. 214. When a custom of the country is proved to exist, it will not be assumed to be confined only to tenancies which are not created by writing, but will be considered as applicable to all tenancies in whatever way they may be created, unless it is expressly or impliedly excluded by the contract. *Wilkins v. Wood*, 17 L. J. Q. B. 819.

⁶ *Woodfall, Landl. & T.* 255; *Watson v. Welsh*, 1 Esp. N. P. 131. If an outgoing tenant at will or for years removes or sells manure made in the ordinary course

usage of the neighboring country, and even in relation to a particular farm, will, however, enter into a decision of the question; since the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. And what may be good husbandry in respect to one particular soil, climate, &c., may not be so in respect to another. But, independent of the usage and custom of the place, Mr. Justice Buller stated the rule to be, that every tenant, when no particular agreement existed, dispensing with that engagement, is bound to cultivate his farm in a husband-like manner, and to consume the produce on it.¹ In conformity to these principles, it has been decided in the State of New York, that, where a farm is taken for agricultural purposes, and there is no particular agreement as to the manure that will be made on it during the occupation of the tenant, the manure does not belong to the tenant, but to the farm, and must be used on the farm; and the tenant has no more right to remove it before the expiration of his term, or to dispose of it to others, than he has to remove or dispose of any fixture belonging to the farm.² A different rule, however, has been laid down in South Carolina, where it is held that a tenant who is about to remove, has a right, if there is no covenant or custom to the contrary, to all the manure made by him on the farm; that it is his personal property, and he may remove it as such; but this case is clearly at variance with all other American decisions, on this subject.³

of husbandry, no property is vested in the vendee, and trespass *de bonis asportatis* will lie against him by the landlord for the taking. *Daniels v. Pond*, 21 Pick. 367; *Lewis v. Lyman*, 22 *id.* 437, 442.

¹ *Brown v. Crump*, 1 Marsh. 567; *Legh v. Hewitt*, 4 East, 154; *Wigglesworth v. Dallison*, Doug. 201; *Webb v. Plummer*, 2 B. & A. 746.

² *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Stone v. Proctor*, 2 Chipm. 115. In *Daniels v. Pond*, 21 Pick. 371, Ch. J. Shaw says, "Manure made on a farm by a tenant at will or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with the soil, or other substances, is by usage, practice, and general understanding, so attached to and connected with the realty, that in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or to sell it to be removed, and such removal

is a tort for which the landlord may have redress." To the same effect is *Lassell v. Reed*, 6 Greenl. 222; and *Lewis v. Jones*, 17 Pa. St. 232. This doctrine is confined to farms let for agricultural purposes; but in *Waln v. O'Connor*, a milk farm was held to be a farm used for agricultural purposes, so far as the right to remove the manure was concerned.

³ *Smithwick v. Ellison*, 2 Ired. 326. Where a farm is let on shares for cultivation, and wheat is raised thereon by the tenant, the straw is a part of the crop, and belongs to the owners thereof; unless there is some stipulation or custom to the contrary. It does not necessarily belong to the farm, nor is there any general usage requiring it to be used as manure upon the land where it grew. *Fobes v. Shattuck*, 22 Barb. 568. In Pennsylvania, it is said, the away-going crop includes as well the straw as the grain which the tenant may remove and dispose of as he pleases, being subject only to the terms of his contract, and not to any sup-

§ 542. There are sometimes *mutual privileges*, founded on the common usage of the neighborhood, where no express agreement exists to the contrary, to which outgoing and incoming tenants are entitled. Thus in England, the outgoing tenant has the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy, for the purpose of ploughing and sowing the land.¹ The same reasonable privileges are believed to exist among us; varying, probably, according to the usages of particular sections of the country, which, as we have just seen, is sufficient to confer such rights, without proof of an immemorial custom. We have observed, that an outgoing tenant has no claim to the manure remaining on the premises, when he leaves there, but the parties may, of course, agree to the contrary; and where the outgone tenant covenanted to leave the manure, to be made by him on the farm, and sell it to the incoming tenant, at a valuation to be made by certain persons; the effect of such covenant has been held to be, to give the outgone tenant a right of onstand for his manure upon the farm, and the possession of and property in it remains in him in the mean time; and, therefore, if the incoming tenant remove and use it before such valuation, he is answerable to the outgone tenant in trespass.²

§ 543. But a tenant may, by his own acts, lose the right to be paid for improvements, notwithstanding an agreement to that effect; as if he leaves the premises, although with the consent of the landlord, before the expiration of his tenancy, but without any fresh agreement with respect to the improvements.³ And it must be borne in mind, that any agreement between outgoing and incoming tenants, in relation to a sale of crops or manure, cannot prejudice the landlord's rights with respect to them.⁴ But in general, all the hay, straw, grass severed, dead and live stock, and every personal chattel upon the farm at the expiration of the tenancy belongs to the tenant, and may be removed by him, unless there be some custom of the country to the contrary, or an express stipulation with the landlord. If there be both custom and stipu-

posed custom of the country on the subject. *Craig v. Dale*, 1 W. & S. 509; *Iddings v. Nagle*, 2 *id.* 22; *Rank v. Rank*, 5 Pa. St. 211.

¹ *Boraston v. Green*, 16 East, 71.

² *Beaty v. Gibbons*, 16 East, 116.

³ *Whittaker v. Barker*, 1 Cr. & M. 118.

⁴ *Petrie v. Daniel*, 1 Smith, 199.

lation, the latter, we must remember, will supersede the former, and determine the tenant's rights. If, however, there be neither custom or stipulation to the contrary, the crops which are in the ground, or are not severed before the expiration of the term, will belong in strictness to the landlord.¹ It only remains to observe, that, where a tenant is entitled to emblements, he is also entitled to ingress, egress, and regress, to reap and carry them away; and the same privilege will belong to his vendee; but neither will have any exclusive right of occupation.²

SECTION IV.

THE TENANT'S RIGHT TO REMOVE FIXTURES.

§ 544. *Fixtures* are chattels, or articles of a personal nature, which have been affixed to the land in such a manner as to constitute part of the realty to which they adhere, and do therefore partake of its incidents and properties. According to the common law, it was waste for the tenant to take down or remove any thing affixed to the freehold, even although he had originally put it up for his own use; and the principle holds good at the present day, as to all fixtures that belong to the landlord, and were attached to the freehold when the tenant took possession, or which are subsequently annexed by the landlord.³ As a general rule, every thing fixed to the land, either immediately, as a house, or indirectly, as a window or door in the house, was considered as belonging to the proprietor of the land; because the things so affixed could not be enjoyed apart from the land to which they were attached. And when placed there by a tenant, they were supposed to be affixed for the increased value of the land, inasmuch as the tenant

¹ Caldecott v. Smythies, 7 C. & P. 808.

² The tenant's interest in this respect is not a mere easement, but amounts to a possession, and is a good answer to an action of trespass brought against him for entering to take the crop away. *Beavan v. Delahay*, 1 H. Bl. 5; 1 Inst. 56, a; *Shep. Touch.* 244; *Griffiths v. Puleston*, 18 M. & W. 358.

³ Co. Lit. 53 a. To constitute a fixture, the article must be permanently and

habitually attached to the land; or it must be a component part of some erection, structure, or machine attached to the freehold, and without which the erection, structure, or machine would be imperfect and incomplete. *Vanderpoel v. Van Allen*, 10 Barb. 157; *Dubois v. Kelley*, id. 496; *Walker v. Sherman*, 20 Wend. 686. In a correct sense, a fixture is understood to comprehend any article which a tenant has the power to remove. *Per Parke, B.*, in *Sheen v. Richie*, 5 M. & W. 182.

could not call upon the owner for compensation ; having annexed them for his own purposes, he could not impose a duty on the landlord without his consent.¹ As between a grantor and grantee of the fee, the doctrine of making fixtures part of the freehold has been more strictly applied than between other classes of persons ; yet the general rule, even here, now is, that any thing of a personal nature, not absolutely affixed to the freehold, is not to be considered as an incident to the land.² And, as between landlord and tenant, the rigor of the old law became gradually relaxed, as a more just method of reasoning suggested that a man might have occasion to affix a chattel belonging to himself, to the land of another, and yet not be willing to part with his ownership in such chattel ; that it might become necessary, for the comfortable or profitable occupation of a house, that the tenant should put up things temporarily for his own use ; and that it would be unjust to consider such articles the absolute property of the owner of the house, when the tenant had manifestly placed them there for his own purposes.³ Courts of law subsequently adopted the principle, that it is for the benefit of the public to encourage tenants to make improvements in trade, and to do what is advantageous for the estate during the term, with the certainty of their being still benefited by it at the end of the term.⁴ And in modern times the rule is understood to be, that, upon principles of general policy, a tenant, whether for life, for years, or at will, is permitted to carry away all such fixtures of a chattel nature, as he has himself erected upon the demised premises, for the purpose of *ornament, domestic convenience* or to *carry on trade* ; provided the removal can be effected without material injury to the freehold.⁵

¹ Culling v. Tuffnell, Bull. N. P. 84.

² Walker v. Sherman, *supra*.

³ Beck v. Rebow, 1 P. Wms. 94 ; Gaffield v. Hapgood, 17 Pick. 195. But the tenant of a mortgagor, by a demise subsequent to the mortgage, is not entitled to fixtures as against the mortgagee as a tenant, but only as a mortgagor. Lynde v. Rowe, 12 Allen, 100. The rule of the common law, was, that whatever was annexed to the soil belonged to it, and whenever the question is between the owner of the soil and the owner of the chattel only, this rule controls in the absence of agreement. Mather v. Fraser, 2 Kay & J. 536 ; Walmsly v. Milne, 7 C. B. n. s. 116 ; Fisher v. Dixon, 2 Clark & F. 812. But as the tenant has possession of the

soil, as well as the chattel, his case forms an exception during his term ; and chattels annexed, and which as between their owner and the freeholder would have vested in the latter, continue to belong to the tenant conditionally on his removing them before the end of his term.

⁴ Lawton v. Lawton, 3 Atk. 18 ; Wall v. Hinds, 4 Gray, 270 ; King v. Johnson, 7 *id.* 241.

⁵ The character of an article, and not its mere annexation, determines whether or not it becomes a fixture. Thus, a hydraulic press in a private house is no fixture, though mortared down, and built on beams, the joists having been removed for that purpose. Parsons v. Hind, 14 W. R. 860 ; so mere weight or bulk, though this

§ 545. *As regards trade fixtures*, it may be stated, in general terms, that a tenant may take away whatever he erects for the purpose of carrying on trade, whether it be machinery or buildings, even though affixed to the soil or freehold. This principle was first distinctly recognized in a case where a tenant for years, who was a soap-boiler, for the convenience of his trade put up vats and copper tables, upon the demised premises. Chief Justice Holt held they might be removed during the term, not by virtue of any special custom, but by the common law, in favor of trade, and to encourage industry.¹ There have been similar adjudications in the case of a baker's oven;² salt pans;³ carding-machines;⁴ cider-mills and furnaces;⁵ steam-engines;⁶ callendars;⁷ platform-scales;⁸ manure which is not the produce of agricultural lands, but accumulates in livery stables;⁹ copper stills, &c., erected to carry on the business of a distillery, though fixed to the building;¹⁰ or a stone for grinding bark affixed to a bark-mill.¹¹ Of the same character are buildings called Dutch barns, standing on a foundation of brickwork in the ground;¹² a varnish house, for carrying on a varnish manufactory, built on a brick foundation with a chim-

may replace affixation, *Pyle v. Pennock*, 2 W. & S. 390; *Winslow v. Merchant Ins. Co.*, 4 Metc. 306, will not, if the article is not essential to the completeness of the thing demised; *Buckley v. Buckley*, 11 Barb. 43; *Harlan v. Harlan*, 15 Pa. St. 507; *Trull v. Fuller*, 28 Me. 545; *Corliss v. McLagin*, 29 *id.* 115. But it seems there must be both annexation; *Walker v. Sherman*, 20 Wend. 636; *Swift v. Thompson*, 9 Conn. 68; *Taffe v. Warnick*, 8 Blackf. 111; *Farrar v. Chauffetete*, 5 Den. 527; *Vanderpoel v. Van Allen*, 10 Barb. 157; *McClintock v. Graham*, 3 McCord, 553; and applicability also, *Despatch Line v. Bellamy M. F. Co.*, 12 N. H. 205; *Lathrop v. Blake*, 8 Fost. 46. While in other cases, manner of annexation has been made the test; *Teaff v. Hewitt*, 1 Ohio St. 511; and the chattel even been held not sufficiently annexed to become a fixture, if its removal would not do material injury to the freehold. *Hel-lawell v. Eastwood*, 6 Exch. 295. But this seems to press the rule too far, as the very definition of a freehold supposes a feasibility of removal. Per *Parke, B.*, *Sheen v. Richie*, 5 M. & W. 182.

¹ *Poole's case*, 1 Salk. 368; *Union Bank v. Emerson*, 15 Mass. 159. The right of a tenant to remove fixtures put in by himself during the time of his possession, cannot be doubted. *Bearsdley v.*

Sherman, 1 Daly, 325; *Hill v. Sewald*, 53 Pa. St. 271.

² *Year Book*, 20 Henry VII. 13. b.

³ *Lawton v. Salmon*, 1 H. Bl. 259, n.; *Pillow v. Love*, 5 Hayw. 109.

⁴ *Taffe v. Warnick*, 3 Blackf. 111; *Merritt v. Judd*, 14 Cal. 59.

⁵ *Holmes v. Tremper*, 20 Johns. 29; *Lawton v. Lawton*, 8 Atk. 13.

⁶ *Cook v. Champl. Transp. Co.*, 1 Den. 92; *Swift v. Thompson*, 9 Conn. 68; *Dudley v. Dudley*, cited by Lord Kenyon, 4 Esp. 34; *Day v. Perkins*, 2 Sandf. Ch. 359.

⁷ *Talbot v. Whipple*, 14 Allen, 177;

⁸ *Bliss v. Whitney*, 9 *id.* 114.

⁹ *Carroll v. Newton*, 17 How. Pr. R. 189.

¹⁰ *Reynolds v. Shuler*, 5 *id.* 323; *Raymond v. White*, 7 *id.* 819.

¹¹ *Heermance v. Vernoy*, 6 Johns. 5; *Taylor v. Townsend*, 8 Mass. 416. Gas-fixtures and sitting stools, placed by a tenant in a shop, though fastened to the building, are not fixtures, as between the landlord and tenant; but they are the property of the tenant, and may be removed by him, after as well as during the term. Per *Bosworth, J.*, *Lawrence v. Kemp*, 1 Duer, 363. But see *Wall v. Hinds*, 4 Gray, 270; *Elliott v. Bishop*, 10 Exch. 512.

¹² *Dean v. Allalley*, 8 Esp. 11; *Wells v. Banister*, 4 Mass. 514.

ney;¹ or a ballroom, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil, and which are removable without injury to the inheritance.²

§ 546. This doctrine was fully considered in the Supreme Court of the United States, where Mr. Justice Story held, that the question whether a given article is capable of removal does not depend upon the form or size of the building, whether it has a brick foundation, is one or more stories high, or has a chimney; but that the only question is, whether it was designed for the purposes of trade; that a tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories high, and on such foundations as he chooses; and was not liable in that case for waste in pulling down and removing a wooden dwelling-house, with a stone cellar and brick chimney, which he erected upon a lot of land he had rented for a term of years, for the purpose of carrying on the business of a dairyman, and for the residence of his family and servants engaged in the business.³ And where a tenant for years took down and removed an old shop standing on the leased premises, and erected a new one on its foundation for the same purposes, the use of a portion of the materials of the old shop in the construction of the new one by such tenant was held not to vest the title to the latter in the owner of the former, if the new shop was a different and distinct building from the old shop, and not the old one repaired or reconstructed; the title to the new shop, in such case, turning on the question, whether it was substantially and essentially the same building as the old

¹ *Penton v. Robart*, 2 East, 88; *Rex v. Otley*, 1 B & Ad. 161. So a dye-house, seventy-five feet long, thirty-five high, and thirty wide, and bolted into the ground. *Talbot v. Whipple*, 14 Allen, 177.

² *Ombony v. Jones*, 19 N. Y. 234. In this case Mr. Justice Grover observes, that the building in question was erected by an innkeeper for the accommodation of his business, and falls within the rule conferring upon tenants the right of removing buildings erected for the purposes of trade. There can be no reason why a tenant engaged in keeping a boarding-house, a tavern, or livery stable, upon demised premises, and requiring additional accommodations, should not be at liberty to construct buildings and remove them at the end of the term, that will not apply with equal force to buildings erected for the purpose of manufacture. Yet the

distinction between erections for trade and agriculture rests upon artificial reasoning not very satisfactory, but is too firmly established to be disregarded. I think the rule to be gathered from the cases is, that a tenant may remove, during his term, all erections made by him for the purpose of trade, that can be removed without injury to the land, or something permanently attached thereto. Where the foundation upon which a building rests is imbedded in the earth, he cannot remove the foundation; but when the building rests upon such foundation, and is confined by its weight only, he may remove the building.

³ *Van Ness v. Pacard*, 2 Pet. 137; *Washburn v. Sproat*, 16 Mass. 449; *Pemberton v. King*, 2 Dev. 376; *Fairis v. Walker*, 1 Bailey, 540; *Godard v. Gould*, 14 Barb. 662.

one.¹ The principle has been held to extend to gardeners and nursery-men, who are considered tradesmen, and may take away their greenhouses and hot-houses, with all trees, shrubbery, &c., planted for the purpose of sale.² But a person who occupies land as a farmer, and is not a professed nursery-man or gardener, cannot carry away young fruit trees raised on the demised premises, for the purpose of planting in his gardens or orchards.³

§ 547. *Domestic fixtures* are all such articles as a tenant attaches to a dwelling-house, in order to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury; such as furnaces, stoves, cupboards, and shelves, bells, bell-pulls, gas-fixtures, &c.;⁴ or things merely *ornamental*, as painted wainscots, pier and chimney glasses, although attached to the walls with screws, marble chimney-pieces, grates, beds nailed to the walls, window blinds and curtains.⁵ All these articles, whether useful or ornamental, are in a manner necessary to the tenant's domestic comfort, and, being easily severed from the house are capable of being equally useful to him in any other house, he may occupy. But things which he affixes to the house in a more permanent manner, in order to complete it, such as hearth-stones,⁶ doors,⁷ and windows, shelves, closets, presses, locks and keys,⁸ he cannot take away, because such things are peculiarly adapted to the house in which they are fixed, and, if taken away are injurious to the freehold.⁹ All substantial additions made to the house, also, become part of the freehold, and are immovable, such as conservatories, greenhouses, hot-houses, pigsties, stables, wash-houses, and other out-houses;¹⁰

¹ *Beers v. St. John*, 16 Conn. 322. What circumstances determine whether the chattel is so annexed, as to be a fixture, are stated, *ante*, § 544 & note.

² *King v. Wilcomb*, 7 Barb. 263; *Penton v. Robart*, 2 East, 90; *Lee v. Risdon*, 7 Taunt. 191.

³ *Wyndham v. Way*, 4 Taunt. 316; *Miller v. Baker*, 1 Metc. 27.

⁴ *Rex v. St. Dunstan*, 4 B. & C. 686; *Lee v. Risdon*, *supra*; *West v. Andrews*, 1 B. & C. 77; *Winn v. Ingleby*, 5 B. & A. 625; *Rex v. Londonthorpe*, 6 T. R. 379; *Leach v. Thomas*, 7 C. & P. 327; *Grymes v. Boweren*, 6 Bing. 437; *Lawrence v. Kemp*, 1 Duer, 363; *Walls v. Hinds*, *supra*. *Huntley v. Russell*, 18 Q. B. 572; *Rex v. Otley*, 1 B. & Ad. 161; *Wansbrough v. Maton*, 4 Ad. & E. 884. In *Martin v. Roe*, 7 Ellis & B. 237; hot-houses of glass and

frame work seventy feet long and twenty high, and resting on brick walls, but not fastened nor connected with the dwelling-house were held removable at any time; and see *Parsons v. Hind*, 14 W. R. 860; *Wood v. Hewitt*, 8 Q. B. 913.

⁵ *Beck v. Rebow*, 1 P. Wms. 94; *Lawton v. Lawton*, *supra*.

⁶ *Poole's case*, 1 Salk. 368, cited in *Elwes v. Mawe*, 8 East, 88. And this is now the law in England by statute, 14 & 15 Vict. c. 25, § 3.

⁷ *Kinlyside v. Thornton*, 2 W. Bl. 1111.

⁸ *St. John v. Piggott*, 2 Bulst. 102; *Liford's case*, 11 Co. 50.

⁹ *Pyot v. St. John*, Cro. Jac. 329; *Kinlyside v. Thornton*, *supra*; *Kimpton v. Eve*, 2 Ves. & B. 849.

¹⁰ *Buckland v. Butterfield*, 2 Brod. & B. 54; *Penry v. Brown*, 2 Stark. 408. A les-

neither can he remove shrubbery or flowers planted by him in the garden.¹

§ 548. This privilege, however, has not been extended to the case of buildings, out-houses, &c., which have been *erected for agricultural purposes*; though it is difficult to perceive why such fixtures should stand upon a less favorable footing than trade fixtures, when the relative importance of the two arts to the community is considered. The industry of the farmer will, of course, be more productive in proportion to the improved condition of his buildings, and his advantages for rearing stock and storing produce; and it seems but a narrow policy which refuses to the agricultural tenant the same protection that is extended to the improvements of the manufacturer. The doctrine was strongly laid down by Lord Ellenborough, in an English case, where the tenant of a farm under a lease for twenty-one years, erected at his own expense a variety of substantial buildings for agricultural purposes, with foundations a foot and a half in the ground; and previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them; the court being of opinion, that to permit him to do so would be an innovation upon the uniform current of legal authorities on the subject.² But in the case before referred to, as containing the opinion of Mr. Justice Story,³ that distinguished judge questioned whether the English doctrine was applicable to the circumstances of this country, and, in fact, seems clearly to have repudiated it. And in Massachusetts the rule applicable to trade fixtures was extended to an agricultural tenant; who was permitted to remove all improve-

see who voluntarily and without contract, express or implied, erects buildings or fixtures, as contradistinguished from chattels, on leased premises, is not entitled to remove them, nor to receive compensation therefor. *Gray v. Oyler*, 2 Ky. 256.

¹ *Empson v. Soden*, 4 B. & Ad. 655; *Penton v. Robart*, 2 East, 91. As to strawberry beds, see *Watherell v. Howells*, 1 Camp. 227. Rails built into a fence by a tenant, under an agreement with the landlord, are the personal property of the tenant. *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 *id.* 844.

² *Elwes v. Mawe*, 8 East, 38. In England, the relative rights of landlord and tenant with respect to farm buildings or machinery erected by tenants for agricultural purposes, or for purposes of trade,

have been regulated by a recent statute. By 14 & 15 Vict. c. 25, if a tenant, with the consent of his landlord in writing, shall erect any farm building, whether detached from the soil or not, or put up any building, engine, or machinery, either for agricultural purposes, or for purposes of trade and agriculture; such erections shall be his property, and may be removed, provided such removal can be done without injury to the freehold, and after giving the landlord a month's notice of his intention to remove them. But after receiving such notice the landlord may elect to purchase them at a valuation to be ascertained by two referees, to be chosen by the parties.

³ *Van Ness v. Pacard*, 2 Pet. 137.

ments the removal of which would not injure the inheritance.¹ In New York, also, the rule was stated generally in the Supreme Court, that a tenant who makes additions or improvements upon the land, for the purpose of its better use and enjoyment, may rightfully remove such additions and improvements, at any time before his right of enjoyment expires, applying the rule to all erections for agricultural purposes, as well as to erections for the purposes of trade; but the Court of Appeals have not sanctioned this extension of the doctrine.² It is to be observed, however, that if the thing in question is so constructed as not to become affixed to the land or house, it is a mere chattel, and cannot, under any circumstances, be considered a fixture. Thus if a tenant erect a barn, and put it upon pattens and blocks of wood lying on the ground, but not let into the ground, it never has been treated as a fixture, but might always be removed.³ So a cider-mill and press erected by a tenant from year to year, also a post and rail fence, have been held to be personal property, removable by him.⁴ And the erection of a chimney does not prevent the right, which would otherwise have existed, of removing the surrounding buildings.⁵

§ 549. So completely are movable fixtures considered the personal property of the tenant, that they may be stripped from the house, and seized and sold under an execution against him, as his goods and chattels, and the tenant may also sell or mortgage⁶ them, although they are not distrainable for rent until after they have been permanently separated from the freehold by the tenant, for the purpose of being applied to some other use.⁷ On his death they go

¹ *Whiting v. Brastow*, 4 Pick. 310.

² *Dubois v. Kelly*, 10 Barb. 495. The New York Court of Appeals, in the case of *Ombony v. Jones*, *supra*, refused to sanction this doctrine to the extent laid down by the Supreme Court in *Dubois v. Kelley*. Judge Comstock, delivering the opinion of the court says, "The rule as thus stated, is, I think, laid down somewhat too broadly. The adjudged cases, I am confident, do not sustain a doctrine so general. On the contrary, the general maxim of the law is, that whatever is affixed to the realty becomes part of it, and partakes of all its incidents and properties. This is the rule even in the relation of landlord and tenant; many exceptions have been grafted upon it, but the rule itself has not been reversed, and therefore it must not be lost sight of."

³ *Smith v. Benson*, 1 Hill, 176; *Culling v. Taffnell*, Bull. N. P. 34; *Horn v. Baker*, 9 East, 215; *Anthony v. Haney*, 8 Bing. 186; *Davis v. Jones*, 2 B. & A. 165.

⁴ *Holmes v. Tremper*, *supra*; *Fitzherbert v. Shaw*, 1 H. Bl. 258.

⁵ *Penton v. Robart*, 2 East, 88; *Van Ness v. Pacard*, *supra*.

⁶ But the mortgagee must remove them before the expiration of the term or the lessee's title becomes paramount. *Talbot v. Whipple*, 14 Allen, 182.

⁷ It would perhaps be more accurate to say that fixtures are completely personalty, only as to the lessee's right of removal, but otherwise realty. Hence if he does not exercise this right, they pass to the owner of the land. But he may transfer this right. *Lond. & W. Loan Co. v. Drake*, 6 C. B. n. s. 798; or it may be

to his executor or administrator, and not to the heir; they are devisable, and by a conveyance pass to the vendee.¹ The tenant's right of removal, however, does not depend altogether, upon the general law, but may be governed by a special custom, or the *lex loci*; and the principles we have formerly noticed under the head of emblements, relative to the effect of usage in regulating the general relation of landlord and tenant, are equally applicable to the law of fixtures. But such usage will never be permitted to contravene an express agreement; and therefore buildings, though erected for the purposes of trade, cannot be removed by the lessee, if his lease contains an express covenant to repair, *and yield up*, at the end of the term, buildings erected during the term.²

§ 550. The rule as regards the removal of any fixture, requires that the article *be capable of removal*, without the destruction or serious injury of the freehold; that is, the premises must be in as good plight and condition after removal as they were before annexation.³ And it is a question for a jury to determine in all cases, pursuant to these principles, whether a given article is removable or not.⁴ It is to be understood, also, that whenever a fixture is removed, the tenant must repair any injury the premises may sustain by the act of removal. Or if an article has been put up in substitution of another, which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture is bound to restore the former, or to replace it by another erection of a similar description.⁵

availed of by his creditors. *Lemar v. Miles*, 4 Watts, 880; *Overton v. Williston*, 81 Pa. St. 160. It has been held that fixtures are not leviable, as under an execution, but the cases so holding will be found to be of freeholder's fixtures. *Rice v. Adams*, 4 Harringt. 882; *Oves v. Ogelsby*, 7 Watts, 106; or of fixtures so annexed as to have lost the capacity of removal; *Pemberton v. King*, 2 Dev. 876. But until this right is exercised, fixtures partake of the nature of the realty. Thus, trover or replevin do not lie for them. *Roberts v. Dauphin Bank*, 19 Pa. St. 71; *Mackintosh v. Trotter*, 8 M. & W. 184; *Greene v. Cole*, 2 Wms. Saund. 259 b; *Wilde v. Waters*, 16 C. B. 487; *Roffey v. Henderson*, 17 Q. B. 574; or assumpsit for goods sold and delivered where they have not been severed. *Lee v. Risdon*, 7 Taunt. 188; and they are subject to a lien on the realty; *Morgan v. Arthurs*,

8 Watts, 140; *Gray v. Holdship*, 17 S. & R. 418.

¹ *Walker v. Sherman*, 20 Wend. 636; 9 Cow. 307.

² *Naylor v. Collinge*, 1 Taunt. 21; *Thresher v. East London W. W. 2 B. & C. 608*. So salt pans are not removable if there is a covenant to leave salt works in good repair. *Manafield v. Blackburne*, 6 Bing. N. C. 428. So *Wilson v. Whately*, 1 Johns. & H. 426.

³ *Whiting v. Brastow*, 4 Pick. 811; *Kirwan v. Latour*, 1 Har. & J. 289; *Lawton v. Lawton*, 8 Atk. 18.

⁴ *Avery v. Cheslyn*, 8 Ad. & E. 75; *Winslow v. Merch. Ins. Co.*, 4 Met. 306. A tenant may prove a license by parol, to remove buildings, to be erected by him on the leased premises, although given at the time of executing the lease, and not included in it. *Dubois v. Kelly*, 10 Barb. 495.

⁵ *Foley v. Addenbrooke*, 18 M. & W.

§ 551. The decisions, also, agree, that whatever fixtures the tenant has a right to remove, must be removed *before his term expires*, or at least before he quits possession; for if the tenant leaves the premises without removing them, and the landlord takes possession, the fixtures then become the property of the landlord.¹ The tenant's right to remove is rather considered as a privilege allowed him than an absolute right to the things themselves, as distinct from the land. If he does not exercise this privilege before his interest expires, he cannot do so afterwards; because the right to possess the land and the fixtures as part of the realty, vests immediately in the landlord; and although the landlord has no right to complain if the land be restored to him in the same plight it was before he made the lease, yet if the land be suffered to come to him with additions and improvements, he has a right to consider them as part of his property.² Nor is this any injustice to the tenant; for it is his own fault if he suffers the land to return to the landlord with the fixtures annexed. But this rule was formerly considered to have its foundation in the presumption of abandonment, arising from the conduct of the tenant in quitting the premises and leaving his fixtures behind him; and hence the presumption could not arise so long as the tenant retained actual possession, even so far as to become a trespasser.³ But this doctrine has been restricted

197. "And the true principle seems to be that the annexation of a chattel to the freehold by a tenant is a conditional gift thereof to the landlord which may be defeated by its timely removal, but otherwise becomes absolute." 2 Smith, Lead. Ca. 257 (5 Am. ed.).

¹ Reynolds v. Shuler, *supra*; Fitzherbert v. Shaw, 1 H. Bl. 258; Lyde v. Russell, 1 B. & Ad. 394; Lee v. Risdon, 7 Taunt. 191; White v. Arndt, 1 Whart. 91; Pemberton v. King, 2 Dev. 376; Gaffield v. Hapgood, 17 Pick. 192; Stockwell v. Marks, 17 Me. 455; Beers v. St. John, 16 Conn. 322; Lawrence v. Kemp, 1 Duer, 863; Shepard v. Spaulding, 4 Metc. 416; Preston v. Briggs, 16 Vt. 124; Haffick v. Stober, 11 Ohio St. 482. So where the tenant has surrendered and even as against his mortgagee. Talbot v. Whipple, 14 Allen, 177.

² The right of removal is determined by an entry for condition broken; Whippley v. Dewey, 8 Cal. 86; Davis v. Eyton, 7 Bing. 164; Weeton v. Woodcock, 7 M. & W. 14; or a judgment in ejectment. Minshall v. Loyd, 2 M. & W. 450; Mackintosh v. Trotter, 3 id. 184.

³ Penton v. Robart, 2 East. 88. In

this case a tenant had underlet a part of the premises to an under-tenant, who erected a building for the purpose of making varnish, in which he carried on his trade, and, after the term had expired, the landlord was obliged to bring a suit against the under-tenant, to recover possession of the premises, who thereupon pulled down the building and carried away the materials, while the suit was pending; the court were of the opinion that he had a right to do so, for that being in possession of the premises at the time the things were taken away, there was no pretence for saying he had abandoned his claim to them. Davis v. Jones, 2 B. & A. 165. In Weeton v. Woodcock, *supra*, however, the court say, the rule to be collected from the several cases decided on this subject, seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period as he holds the premises, under a right still to consider himself as tenant. See also Roffey v. Henderson, 17 Q. B. 574. And in Heap v. Barton, 12 C. B. 274. Ld. C. J. Jervis, speaking on this subject says, "The courts

by later cases to a right of removal only during the lessee's term, and such further time as he holds the premises under a right to consider himself as tenant.¹

§ 552. If a tenant, at the close of his term, *renews his lease*, and acquires a fresh interest in the premises, he should take care to reserve his right to remove such fixtures, as he had under the old tenancy a right to sever. For where his continuance in possession is under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seised of the land together with the fixtures, had demised both to him.² But if, in consequence of a verbal agreement with his landlord to purchase the fixtures, a tenant neglects to remove them during the term, he cannot be supposed to have abandoned them to his landlord.³ There are cases, also, in which, from the very nature of the tenancy, the lessee must have the privilege of removing fixtures after the termination of his interest; such as where he holds under any uncertain term or contingency, as for life, or at will or upon the happening of an event. In such cases, no presumption of gift arises, the property still remains in the tenant; and he may remove it after his term has ended, provided, he exercises that right within a reasonable time.⁴ It is for a similar reason, that an exception to the rule prevails in favor of nurserymen; for in the case of a lease for the purpose of nurturing trees

seem to have taken three separate views of the rule: first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has, during the term, exercised his right to reserve them; secondly, as in *Penton v. Robart*, that the tenant may remove the fixtures, notwithstanding the term has expired, if he remains in possession of the premises; and thirdly, that his right to remove them after his term has expired is subject to this further qualification; namely, that the tenant continues to hold the premises under a right still to consider himself as tenant. The right to remove fixtures remains so long as the tenant remains in possession, and until it has been judicially determined that a forfeiture has taken place, and the landlord is repossessed by legal process. *Keogh v. Daniell*, 12 Wisc. 168.

¹ *Weeton v. Woodcock*, *supra*. This rule is stated in *Heap v. Barton*, *supra*, by Jervis, C. J., without however deciding upon it, and see *Roffey v. Henderson*, *supra*. In *Leader v. Homewood*, 5 C. B. n. s. 546, 558; *Lond. & W. Loan Co. v.*

Drake, 6 *id.* 798, 810, the rule is declared to be fully established. The law seems to be the same in this country. *Mason v. Fenn*, 18 Ill. 525, 527; *Merritt v. Judd*, 14 Cal. 59; *Davis v. Moss*, 88 Pa. St. 346, 358; *Overton v. Williston*, 81 *id.* 155.

² *Shepard v. Spalding*, 4 Metc. 416; *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Thresher v. East London W. W.* 2 B. & C. 608; *Lee v. Risdon*, 7 Taunt. 188; *Colegrave v. Dios Santos*, 2 B. & C. 79.

³ *Hallen v. Runder*, 8 Tyrw. 959. Nor if he has a verbal agreement with his landlord, that he may afterwards remove them. *McCracken v. Hall*, 7 Ind. 80. So of course where the tenant is prevented from removing fixtures by the act of the landlord as by injunction to that effect before the term expires, he may remove them after the expiration of the term and on the dissolution of the injunction. *Bircher v. Parker*, 40 Mo. 118; *Mason v. Fenn*, 18 Ill. 525.

⁴ *Weeton v. Woodcock*, *supra*; *Haslick v. Stober*, 11 Ohio, St. 482; *Lawton v. Lawton*, 8 Atk. 18.

and plants until they are ready to be transplanted, in the absence of any express agreement, the interest of the tenant in the land, for the purpose contemplated by the parties, will be held to continue until that purpose is accomplished; and the tenant will be allowed to cultivate the trees until they can be transplanted, and then to remove them.¹ Where property is demised with fixtures, the tenant's interest in them is similar to that which holds with respect to trees; if he severs them, the right of possession immediately reverts to the landlord.²

§ 553. Whenever the tenant quits possession of the land without removing his fixtures, the property in them immediately vests in the landlord, and though they are subsequently severed, the tenant's right to them does not revive. This was held in a suit brought by a tenant from year to year, for bells, pulls, cranks, and wires, which he had hung at his own expense; after he quit possession the landlord took down the bells, intending to sell them, and refused to deliver them to the tenant, but the tenant was not allowed to recover.³ Where a tenant, therefore, has a right to remove fixtures, and wishes to leave them on the premises after the expiration of the term, for the purpose of valuing them to an incoming tenant, or for any other purpose, it can only be with his landlord's consent; for if, without such consent, they remain on the premises after the expiration of the term, the tenant loses his property in them.⁴

¹ *Miller v. Baker*, 1 Metc. 27; *Whitmarsh v. Walker*, id. 818; *King v. Wilcomb*, *supra*. In this case, Mr. Justice Harris remarks, with that clearness and precision which distinguish the learned judge. "The ancient rule, that whatever was attached to the freehold by the tenant, became part of the freehold, and could not afterwards be removed by him, has gradually been relaxed in favor of the tenant, until now I understand the general rule to be, that any one who has a temporary interest in land, and who makes additions to it, or improvements upon it, for the purpose of the better use or enjoyment of it, may, while such temporary interest continues, at any time before his right of enjoyment expires, rightfully remove such additions and improvements. If he omit to sever the addition or improvement until his right of enjoyment ceases, such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement he has made becomes, to all intents, a

part of the inheritance; and the tenant, as well as any other person who severs it, becomes a trespasser. I think this may now be stated to be the general rule in respect to fixtures, which a tenant attaches to the freehold. To this extent the original rule of the common law, *quicquid plantatur solo, solo cedit*, has yielded to the changed condition of society. Public policy, especially in this country, requires that the tenant should be permitted so to use the premises he occupies, as to derive the greatest amount of profit and comfort, consistent with the rights of the owner of the freehold. There may be exceptions to the general rule I have stated, but I think they will be found limited to cases, where the removal of the additions or improvements made by the tenant would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession."

² *Farrant v. Thompson*, 5 B. & A. 826.

³ *Lyde v. Russell*, 1 B. & Ad. 394.

⁴ *Minshall v. Lloyd*, 2 M. & W. 450.

§ 554. The rights of parties, respecting particular articles, will be much regulated by custom ; and, therefore, where it has been customary to value a particular article, between outgoing and incoming tenants, it becomes a proper criterion for determining the nature of the property, and whether it is a *fixture* or not.¹ A tenant may, by the terms of his agreement, not only vary his rights as to the description of articles he is entitled to remove, but may enlarge the time of their removal, and subject himself to greater restrictions, or secure to himself greater privileges in the ultimate disposition of them, than would attach to him merely as tenant. As, for example, where he has, by the terms of his lease, the privilege of selling his fixtures, by valuation, to an incoming tenant, his property in the fixtures would not determine at the expiration of the lease, and he would still have a right of onstand on the premises.² He may, in fact, acquire an almost unlimited power by the terms of his lease, of removing things which he affixes to the freehold ; as if his demise for years contains the clause *without impeachment of waste*, this condition will have the same effect as if it were inserted in a demise of an estate for life.³ By entering into special conditions of this nature, the parties entirely change the situation in which they would stand to each other, from the mere relation of landlord and tenant ; and the claims in controversy would in such cases, resolve themselves into questions of construction, where the only point for determination is whether the article in question falls within the terms of the agreement or not.⁴ It is not unusual, however, for the sake of avoiding disputes, to insert clauses in the lease for removing fixtures, as that the tenant shall have the liberty to remove all the machinery and erections he puts up. And it may be almost unnecessary to observe, that where, at the time of making a demise, nothing is said respecting the fixed articles belonging

But the acceptance of an under-lease of land, with all the privileges belonging thereto, as enjoyed by the outgoing tenant, does not subject the sub-lessee to the obligation of a covenant, in the original lease, to leave all buildings which the lessee might erect during the tenancy. *Ombony v. Jones, supra.*

¹ *Davis v. Jones*, 2 B. & A. 166. The relative rights of landlords and tenants have been in these respects regulated in England by 14 & 15 Vict. c. 25, § 8, which provides that if any tenant, with the written consent of his landlord, erects any

farm buildings or machinery for agricultural purposes, or for the purposes of trade and agriculture, they shall remain the property of the tenant ; but he cannot remove them without first giving his landlord thirty days' written notice of his intention, when the landlord may elect to purchase them of the tenant, at a valuation to be fixed by two referees.

² *Beaty v. Gibbons, supra* ; *Burn v. Miller*, 4 Taunt. 745.

³ Com. Dig. tit. 8, ch. 2, § 12.

⁴ *Rex v. Topping*, Trin. T. 6 Geo. IV.

to the premises, the tenant will be entitled to the use of them during his tenancy, as part of the demised property ; and the landlord cannot afterwards, and before the expiration of the term, remove them, or insist upon their being valued or paid for.

CHAPTER XIII.

THE LANDLORD'S REMEDIES.

§ 555. THE respective rights and obligations of the landlord and tenant having been disposed of, it now remains to explain the various remedies or means by which those rights may be enforced. They naturally fall under the division of, 1. The landlord's proceedings against the tenant; and 2. Those of the tenant against the landlord. Of the former class are those for the recovery of rent by distress, or by actions which at common law are known as actions of debt, assumpsit, covenant, or bill in equity; actions to prevent waste, or recover damages for its commission; and actions to recover possession of the premises, by ejectment, or by summary proceedings under the statute. The latter class comprehend actions formerly known as actions of replevin, trespass, case, and covenant; while the proceedings for a forcible entry and detainer are common to both landlord and tenant. This last proceeding, however, is punishable rather as a breach of the peace, than as an offence against the property of an individual, and, as such, is indictable at common law; but in our observations we shall regard it simply as a private remedy, incident to the relation of landlord and tenant. We propose to adhere to the common-law distribution of remedies as now enumerated; for although the Code of Procedure of New York, as well as the statutes of many of the other States of the Union, have abolished the long-established distinctions between actions at law and suits in equity, with their respective forms, and have substituted one form of action for the enforcement or protection of all private rights, and the redress of all private wrongs, yet the distinctive principles which govern all remedies are still retained: and legislative action seems, thus far, to have resulted in abolishing the technical distinctions between legal and equitable remedies, and the blending into one tribunal of the several functions formerly performed by separate courts of law and equity, leaving the general principles of pleading untouched. We

think, therefore, the course we have indicated, that of retaining the former division of actions, will be found both perspicuous and convenient, in treating of the remedies connected with the subject of our essay.

SECTION I.

OF A DISTRESS FOR RENT.

§ 556. A distress for rent is one of the most efficient of the landlord's remedies for the collection of rent; enabling him to secure a regular remuneration for the tenant's occupation, by seizing the goods and chattels which have enjoyed the shelter and protection of his premises, holding them in pledge for a period, giving the tenant an opportunity to redeem, and then, after reasonable notice, to proceed and sell them in satisfaction of the debt. The proceeding is said, by Lord Chief Baron Gilbert, to have been derived from the civil law;¹ by which land that was let to the tenant was hypothecated, or held in pledge, to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land were liable to be sold for the payment and satisfaction of it. It is certainly a remedy of very high antiquity, and is known to have prevailed among the Gothic nations of Europe immediately after the breaking up of the Roman Empire, and from them was probably carried into England.² The English statutes, from the days of Magna Charta to the present time, have regulated, and in some in-

¹ Gilbert on Rents, 8-26-92. By the Roman law, a landlord's lien for the rent of his farm was confined to the produce of the field, and did not extend to implements of husbandry or cattle; but, in the case of a house rented, all the movables in the house were liable to distress for the rent. Dig. 20-27.

² Spelman's Gloss. Parcus. Mr. Chancellor Kent, with his usual elegance, has thus sketched the policy and bearings of this provision of law. "The contract for rent and the remedy of distress are in constant use and application; and in our cities and large towns there are few branches of the law that affect more sensibly the interests of every class of people. The law may be deemed rather prompt and strict with respect to the interests of the landlord; but I am inclined to think

it is a necessary provision, and one dictated by sound policy. It is best for the tenant, that he should feel the constant necessity of the early and punctual performance of his contract. It stimulates to industry, economy, temperance, and wakeful vigilance; and it would tend to check the growth and prosperity of our cities, if the law did not afford to landlords a speedy and effectual security for their rents, against the negligence, extravagance, and frauds of tenants. It is that security which encourages moneyed men to employ their capital in useful and elegant improvements. And if they were driven, in every case, to the slow process of a suit at law for their rent, it would lead to vexatious and countless lawsuits, and be in many respects detrimental to the public welfare." 8 Kent, Com. 495.

stances extended, its provisions to meet the exigencies of the times. Our State legislatures adopted, and sometimes modified, the English statutes, recognizing it as a salutary and necessary remedy, equally conducive to the security of the landlord, and the welfare of society; but seem now to be gradually abolishing this ancient remedy, as giving an undue advantage to landlords, over other creditors in the collection of their debts.

§ 557. The original definition of a distress was the taking of the personal chattel of a wrong-doer into the possession of the party aggrieved, as a pledge for the performance of a duty, or the satisfaction of a wrong committed; and the distrainer was bound to hold the pledge in his custody until the pledgor thought proper to redeem it. This power was given to the lord, in lieu of a forfeiture of the land, for the purpose of compelling the tenant to perform those services which were the consideration of his enjoyment of the land; but the distress was considered merely a pledge, and the detention thereof was justifiable only so long as the duties incident to the tenure remained undischarged. If the tenant offered gages and pledges for the performance of the services, and the lord, after such offer, persisted in detaining the distress, the tenant might sue out a writ of replevin: which was considered so much a matter of right, that if a person by deed granted a rent, with a clause of distress, and granted further that the distress taken should be irreplevisable, yet it might be replevied, because such a restriction was held to be contrary to the nature of a distress.¹ But in modern times the whole policy of the law respecting distresses has been changed, and a distress for rent is now no more than a summary method of seizing and selling the tenant's property, to satisfy the rent which he owes.²

¹ 1 Inst. 46 b. Lord Kaim's Law Tracts, No. 4, says, "It is not difficult to discover the foundation of the privilege of distraining for rent. Lands originally were occupied by bondmen, who were themselves the property of the landlord, and consequently were not capable of holding any property of their own; but such persons, who had no interest to be industrious, and who were under no compulsion, when not under the eye of a master, were generally lazy and always careless. This made it eligible to have a free man to manage the farm, or to let it out upon shares, by which the tenant only had a claim, by virtue of the contract, for that part of the produce he was entitled to. The whole fruits, as *pars soli*, belonged to

the landlord while growing upon the land, and the act of separating them from the ground could not transfer the property in them to the landlord. As the nature of leases gradually changed, and their value to the tenants increased, the products of the soil came to be considered the property of the tenant; but the landlord's property in them to the extent of his rent continued inviolable, and to this limited extent he was still considered proprietor. He therefore continued to levy his rents by his own authority; for no man needed the authority of a judge to lay hold of his own goods, and it made no difference whether rents were payable in money or in kind."

² Distress for rent is not a suit at com-

§ 558. The common law of England, and most of her statutory provisions regulating a distress for rent, have been generally adopted in the United States.¹ In the New England States, the law of attachment on *mesne* process has superseded the law of distress for rent; but under their attachment laws the principles of the common-law doctrine of distress have been essentially assumed subject to the same checks and limitations which, under the English statute law and modern decisions, have modified and improved it.² The State of New York has abolished this remedy, regarding it as an invidious distinction in favor of a particular class of creditors, which has survived similar remedies applicable to other debts, sometimes operating unjustly towards other classes of creditors who are equally entitled to protection. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common-law process of distress does not exist in that State.³ It is, however, in force in South Carolina; and the statute of 1808 even allows landlords to distrain for double rent, where a tenant holds over for three months, after notice to quit.⁴ In Georgia, it is limited to the cities of Savannah and Augusta. In Alabama, Tennessee, and Ohio there are no statutory provisions on the subject, except one in the latter State, to secure the landlord's share of the crops from execution against the tenant.⁵ Mississippi has abolished it by statute, but property shall not be taken in execution on the premises, unless a year's rent, if it be due, shall be first tendered to the landlord.⁶ And in Louisiana the landlord may follow the furniture removed from his premises fifteen days after removal; and, if removed without his consent, he may seize the goods and sell them to satisfy his claim, provided they continue to be the property of the lessor.⁷

§ 559. *Rent-service* was the only kind of rent originally known to the common law, a right of distress being incident thereto, so long as it was due to the lord who was entitled to the fealty. It was

mon law, or under the statute. The only legal proceeding therein is for the court to determine if the relation of landlord and tenant exists. *Alwood v. Mansfield*, 83 Ill. 452.

¹ *Hartshorne v. Kierman*, 2 Halst. 29; *Hoskins v. Paul*, 4 *id.* 110; *Woglam v. Cowperthwaite*, 2 Dall. 68; *Garrett v. Hughlett*, 1 Har. & J. 8; *Dorsey v. Hays*, 7 *id.* 370; *Charleston v. Price*, 1 McCord, 299; *Ridge v. Wilson*, 1 Blackf. 409; *Owens v. Connor*, 1 Bibb, 607; *Mayo v.*

Winfree, 2 Leigh, 370; *Burket v. Boude*, 8 Dana, 209; *Hale v. Burton*, Dudl. 105; *Terrel v. Ligon*, Walker, 170.

² *Potter v. Hall*, 3 Pick. 368.

³ *Dalgleish v. Grandy*, Cam. & Nor. 22; *Youngblood v. Lowry*, 2 McCord, 89; *Deaver v. Rice*, 4 Dev. & B. 431.

⁴ *Talvande v. Cripps*, 3 McCord, 147; *Reeves v. McKenzie*, 1 Bailey, 497.

⁵ *Griff. Law Reg.* 404; *Aiken, Dig.* 357.

⁶ *Griff. Law Reg.* 697.

⁷ *Civil Code of Louisiana*, 2675.

called rent-service, because it was given as a compensation for the military service to which the land was originally subjected. Where a rent was granted out of lands by deed, the grantee had no power to distrain for it, because there was no fealty annexed to such a grant; for, by the statute of *quia emptores*, 18 Edw. I., when a tenant alienated his whole estate, the alienee held immediately of the lord, and not of the alienor; by which means the reversion as well as the services, being divested out of the alienor, he could not distrain for a rent reserved upon his alienation, but it was in his hands a *rent-seck*. To remedy this inconvenience, an express power of distress was inserted in grants of this kind, where the landlord had no reversion or future interest in the land; and it was thence called a *rent-charge*, because the land was by the deed charged with the distress. A *rent-seck* was, in effect, nothing more than a rent, for the recovery of which no power of distress was given, either by the rules of the common law or the agreement of the parties.¹ In the first instance, the common law gave a power of distress to the landlord, as an incident to the render of service; but in no other case had he such power, except by force of an agreement.

§ 560. These distinctions, however, became of little consequence after the statute of 4 Geo. II. c. 28, which so far abolished the distinction between different kinds of rent, as to give the remedy of distress in all cases of *rent-seck*, as well as of rent reserved generally upon a lease; and such was the effect of the Revised Statutes of New York, which was almost a transcript of the English statute. Previous to this statute, a distress could only be taken by him who had a reversionary interest in the premises; and, if a man made a feoffment, or lease in fee, reserving rent, but leaving no reversion in himself, he could not distrain for such rent, unless he had expressly reserved a power of distress.² The statute, however, separated the right of distress from the reversion to which it had before been incident, and placed all rents upon the same footing as if the power of distress had been expressly reserved. In all those States, therefore, where this statute has been adopted, that which before the statute of *quia emptores* would have been a *rent-seck* becomes a *rent-charge*; and a grantor who has reserved rent may in all cases, dis-

¹ Co. Lit. 142 a; 148 b; Bradby on — v. Cooper, 2 Wils. 875; Smith v. Dist. 24. Mapleback, 1 T. R. 441; Cornell v. Lamb,

² Prescott v. DeForest, 16 Johns. 159; 2 Cow. 652; Co. Lit. 148 b.

train for it, though he has no reversion.¹ But it is to be observed, that the statute provides for no reservation which would not, at least amount to a *rent-secck* at common law, issuing out of lands and tenements. And as rent therefore cannot issue out of a mere chattel,² it has been repeatedly held since the statute, that if a lessee for years assigns his whole term, reserving rent, but without a special clause authorizing a distress, he cannot distrain upon such reservation, and his only remedy is upon the contract between himself and the assignee.³

§ 561. There can be no distress unless there be an actual demise, at a certain fixed *rent*, either in money, produce, or services, payable at a time certain; or unless the amount, if not fixed, is capable of being reduced to a certainty by calculation.⁴ As where the rent is payable in repairs to be put upon the demised premises, to a certain specified amount;⁵ or to shear all the sheep depasturing in the landlord's manor, by way of rent, without putting it at a certain value in money in the lease, although the number of sheep may vary from time to time; for this is capable of being reduced to a certainty by referring to the usual number of sheep, and then calculating the price or value of shearing them.⁶ But this mode of computation is to be taken with the qualification, that it must not be subject to continual deductions, as for the erection of new buildings, or the like.⁷

§ 562. In a case where the lease reserved an annual rent of three dollars an acre for all improved land on the demised premises, the tenant agreeing to build a certain quantity of stone fence, part at so much per rod, and the residue for such price as might thereafter be agreed upon by the parties, the whole to be applied to the payment of the rent; it was held, that these latter provisions did not make the rent so uncertain as to prevent the landlord from dis-

¹ *Bradbury v. Wright*, Doug. 624; *Schuyler v. Leggett*, 2 Cow. 660.

² Co. Lit. 47, a; 142 a; *Walker v. Denne*, 2 Ves. 170.

³ *Palmer v. Edwards*, Doug. 187; *Burne v. Richardson*, 4 Taunt. 720; *Parmenter v. Webber*, 8 *id.* 598; *Preece v. Corrie*, 5 Bing. 24.

⁴ *Valentine v. Jackson*, 9 Wend. 802; *Dunk v. Hunter*, 5 B. & A. 322; *Grier v. Cowan*, Addis. 347; *Wells v. Hornish*, 8 Penn. 80; *Reeves v. McKenzie*, 1 Bailey, 500; *Jacks v. Smith*, 1 Bay, 315.

⁵ *Smith v. Colson*, 10 Johns. 91; *Cornell v. Lamb*, *supra*.

⁶ Co. Lit. 96 a. In South Carolina, it is said no distress will lie, unless the rent is expressly reserved, and that the reservation of a specific sum, as rent, *eo nomine*, is the true criterion of a party's right to distrain for rent in arrear. *Marshall v. Giles*, 2 Const. R. 637. In Indiana, distress will not lie where a tenant contracts to deliver, as rent, one-third of the corn he shall raise on the premises. *Clarke v. Fraley*, 8 Blackf. 264.

⁷ *Regnart v. Porter*, 7 Bing. 451.

training.¹ And though the tenant hold under a void lease it may still be resorted to as evidence to make the rent for the current year certain, and so confer a right of distress on the landlord.² But if the premises are demised at a fixed rent, and the tenant enters, but is prevented from obtaining the whole of the premises by a person holding part under a prior lease executed by the landlord, the latter has no right to distrain for a proportionable part of the rent reserved, by deducting the value of the part held under the prior lease, and demanding the residue; though in such case he might be entitled to recover in an action of *use and occupation* upon a *quantum meruit*.³

§ 563. In order to sustain the right of distress, the relation of landlord and tenant must be actually completed and not merely in contemplation; there must be an actual demise and not a mere agreement for a lease.⁴ But when this relation is once established, the right of distress is incident thereto, without any special reservation of a power to that effect, and it can only be taken away by that which amounts to a dissolution of the tenancy.⁵ The landlord consequently does not possess this right in cases where the tenant is simply occupying the premises, as a mere tenant at will, and without any express agreement as to the amount of rent to be paid; or has been let into possession under an agreement for a lease to be subsequently executed.⁶ But the tenancy that will authorize a distress need not necessarily be in writing, nor in any particular form, for a lease may be inferred from circumstances; a parol lease will be sufficient,⁷ and very slight circumstances will constitute a tenancy for this purpose; as the admission by a party holding under an agreement of a charge of half a year's rent, in an account between him and his landlord, or the payment of a previous quarter's rent.⁸

§ 564. So a holding-over, after the expiration of a lease for a

¹ Smith v. Fyler, 2 Hill, 648.

² Edwards v. Clemons, 24 Wend. 480.

³ Lawrence v. French, 25 Wend. 448.

⁴ Schuyler v. Leggett, 2 Cow. 660; Jacks v. Smith, 1 Bay, 815; Dank v. Hunter, *supra*. If the relation of landlord and tenant has been terminated by a surrender, although such surrender provides that the tenant shall remain liable for rent, the landlord cannot distrain; his remedy is on the special agreement. Bain v. Clark, 10 Johns. 424. But a surrender after distress made for rent due will not render the dis-

tress unlawful. Nichols v. Dusenbury, 2 N. Y. 283.

⁵ Prescott v. DeForest, 16 Johns. 159; Hill v. Stocking, 6 Hill, 277; Hegan v. Johnson, 2 Taunt. 148; Knight v. Benett, 8 Bing. 861; Coupland v. Maynard, 12 East, 184; Schuyler v. Leggett, *supra*.

⁶ Farrington v. Baley, 21 Wend. 65.

⁷ Cornell v. Lamb, 2 Cow. 652; Jacks v. Smith, 1 Bay, 815; Knight v. Benett, 8 Bing. 861.

⁸ Cox v. Bent, 5 Bing. 185.

year, is a continuation of the former tenancy, and subjects the tenant to a distress whether the first demise be by deed or parol.¹ And the right subsists if the lease, under which the tenant holds, is void under the statute; for though it may be void, as a lease for the term, it yet enures as a tenancy from year to year, and must regulate the terms on which the tenancy subsists in all other respects except its duration.² Where, however, the lessor refused to give the lessee possession of the premises on the day fixed in the lease, and the lessee subsequently occupied the premises, not under the lease but under a new and different agreement by parol, the lessor was held not to be entitled to distrain on the first contract.³ A right of re-entry, in default of payment of rent, does not divest the right of distress;⁴ and on the demise of a grist-mill, the lessee to render one-third of the toll, it was held the lessor might distrain;⁵ nor is it essential that it be reserved as rent, for if it appear to be for the use and occupation of lands or houses, it is sufficient, though not denominated rent.⁶ In Pennsylvania, it seems to have been doubted whether a right of distress existed where the rent was payable in *grain* or other produce; but it was held, that a distress in such a case for *money* was clearly illegal.⁷ And in Kentucky it has been decided that a landlord may distrain for rent payable in specific articles, though he cannot sell the goods distrained.⁸

§ 565. At common law, the right of distress is not extinguished by an unsatisfied judgment for rent;⁹ for, as a general rule, the acceptance of an obligation of an inferior, or even of an equal degree, does not extinguish a prior obligation. Nor will the mere fact of taking a promissory note for rent prejudice a landlord's right to distrain, unless there is an agreement that it shall operate as a suspension of the right; for a note is but an acknowledgment of the debt, does not alter its nature until paid,¹⁰ and will not even suspend the right of distress until it becomes due.¹¹ But if a note

¹ Webber v. Shearman, 8 Hill, 547; s. c. 6 *id.* 20; Mann v. Lovejoy, Ry. & M. 355; Doe v. Smith, 1 Mood. & R. 137.

² Schuyler v. Leggett, 2 Cow. 660.

³ Spencer v. Burton, 5 Blackf. 57.

⁴ Smith v. Meanor, 16 S. & R. 375.

⁵ Fry v. Jones, 2 Rawle, 11.

⁶ Price v. Limehouse, 4 McCord, 546.

⁷ Warren v. Forney, 13 S. & R. 62.

⁸ Owens v. Conner, 1 Bibb, 606.

⁹ Snyder v. Kunkleman, 3 Penn. 490; Chipman v. Martin, 18 Johns. 240; Bant-

leon v. Smith, 2 Binn. 146; Bates v. Nellis, 5 Hill, 651.

¹⁰ Peters v. Newkirk, 6 Cow. 103; Snyder v. Kunkleman, 3 Penn. 487; Harris v. Shipway, Bul. N. P. 182; Vansteenburgh v. Hoffman, 15 Barb. 28.

¹¹ Davis v. Gyde, 4 Ney. & M. 462; Bailey v. Wright, 3 McCord, 484. Rent due is not extinguished by taking a note and a chattel mortgage collateral to the note. Lofsky v. Maujer, 3 Sandf. Ch. 69; see, *ante*, § 392, note.

is taken in absolute payment of rent, the landlord's only remedy is upon the note.¹ The acceptance of a bond for rent, or an order drawn upon a person not in funds, has been held not to extinguish this right, although a receipt in full, for the amount of rent due, was taken; because rent, issuing out of the realty, is of a higher nature than any simple contract.² Nor is the right to distrain at the end of the year affected by an agreement in the lease, that the landlord may re-enter if the rent is unpaid at a stipulated period after the expiration of the year;³ or that he shall be allowed to charge interest on the rent in arrear.⁴ But a landlord cannot distrain if he has treated the tenant as a trespasser, although the tenant remains in possession to the day of the distress;⁵ nor, as it would seem, after he has given the tenant notice to quit, without some evidence of a renewal of the tenancy.⁶ A surrender of a part of the premises, however, will not exempt the tenant from a liability to distress, as to the residue.⁷ But where, upon the surrender of a lease, it was agreed that the tenant should remain liable for a year's rent, and that the lessor might take all lawful means for its recovery, according to the lease; it was held that the lessor could not distrain for such rent, but that his remedy was on the special agreement alone, since by the surrender the relation of landlord and tenant ceased.⁸ A landlord who agrees not to distrain the goods of an under-tenant, so long as he pays his rent to the original lessee, is not thereby prevented from distraining unless he has notice of a tender of the rent by the under-tenant to his lessor.⁹

§ 566. A previous demand of rent is, in general, unnecessary to confer a right of distress; but if a lease contains a reservation of rent, payable quarterly or half yearly, *if required*, and the landlord receives rent for some time quarterly, he cannot afterwards

¹ *Warren v. Forney*, 18 S. & R. 52.

² *Ib.*; *Cornell v. Lamb*, 20 Johns. 407; *Price v. Limehouse*, 4 McCord, 544; *Printers v. Helfried*, 1 Nott & McC. 187; *Bailey v. Wright*, 8 McCord, 484. One lien of a distress, when made, is lost by the lessor's replevying, and he is left to his rights on the replevin bond. *Speer v. Skinner*, 35 Ill. 282.

³ *Smith v. Meanor*, 16 S. & R. 375.

⁴ *Skerry v. Preston*, 2 Chit. 245.

⁵ *Brydges v. Smyth*, 2 Moore & P. 740; *Jackson v. Sheldon*, 5 Cow. 448; *Newman v. Rutter*, 8 Watts, 55.

⁶ *Jenner v. Clegg*, 1 Mood. & R. 218.

⁷ *Peters v. Newkirk*, 6 Cow. 103. In the case of the lease of an unfinished building, which was to be completed by the landlord, the tenant took possession and occupied the premises for two quarters, and then abandoned them, for the reason that the landlord had not completed them according to his agreement; the landlord was allowed to distrain for the second quarter's rent. *Nichols v. Dusenbury*, 2 N. Y. 283.

⁸ *Bain v. Clark*, 10 Johns. 424.

⁹ *Welsh v. Rose*, 6 Bing. 638.

distrain without notice to pay.¹ A legal tender of the amount due destroys the right of distress, though the tender is not made until after the rent-day, or even after the proceedings in distress have been commenced, provided the expenses of such proceeding are also tendered.² The tenant may, in fact, claim a return of the goods at any time before they are actually sold, upon making such tender, and if the landlord refuses to deliver them it is a wrongful detainer.³ But the tender must be made to the landlord and not to his bailiff, unless the latter is particularly authorized to accept or refuse it.⁴ When made to the distrainor's wife, however, who had been in the habit of acting as his agent in such matters, it was held sufficient.⁵ But it comes too late after cattle are actually impounded, for they are then in custody of the law.⁶ If the landlord proceeds with the distress after a tender, without a subsequent demand and refusal of the rent, the tenant's remedy is by action of trespass or replevin, or he may rescue the distress.⁷

§ 567. A distress for rent can only be made in the name of the person to whom the rent is due, and not in the name of his bailiff.⁸ Nor will an authority in writing to a tenant, to pay the rent to a third person, authorize a distress by such person.⁹ At common law, after a lessor parts with his reversion, he can neither distrain upon the assignee or the original lessee.¹⁰ Yet a tenant from year to year, who underlet to another from year to year, is considered as not having parted with his whole interest, but retains such a reversion as enables him to distrain.¹¹ So if a tenant for life makes a lease for any number of years, no matter how impossible it may be that his life should last so long, he is still deemed to have a reversion in the premises.¹²

§ 568. When a lessor assigns his reversion, the assignee may distrain; for the privity of contract which subsisted between the lessor and lessee is in such case transferred from the lessor to his

¹ *Offutt v. Trail*, 4 Har. & J. 20; *Mallam v. Arden*, 10 Bing. 299; *Royer v. Ake*, 8 Penn. 461.

² *Hunter v. LeConte*, 6 Cow. 728; *Williams v. Howard*, 3 Munf. 277; *Smith v. Goodwin*, 4 B. & Ad. 413.

³ *Six Carpenters' case*, 8 Co. 146, b; *Hinton v. Blain*, 2 Bailey, 168; *Vertue v. Beasley*, 1 Mood & R. 21.

⁴ *Pilkingtton's case*, 5 Co. 76; *Moffat v. Parsons*, 5 Taunt. 307.

⁵ *Brown v. Powell*, 4 Bing. 280.

⁶ *Ladd v. Thomas*, 12 Ad. & E. 117.

⁷ *Co. Lit.* 160, b; 8 Co. 147, a.

⁸ *Swearingen v. Magruder*, 4 Har. & McH. 347.

⁹ *Ward v. Shew*, 9 Bing. 608.

¹⁰ *Preece v. Corrie*, 5 Bing. 24; — *v. Cooper*, 2 Wils. 875; *Parmenter v. Webber*, 2 Moore, 656.

¹¹ *Curtis v. Wheeler*, Mood. & M. 493.

¹² *Smith v. Day*, 2 M. & W. 684; *Rogers v. Humphrey*, 4 Ad. & E. 299.

assignee, by the statute of 32 Hen. VIII. c. 34, as well as by those American statutes which have adopted the English statute; and the assignee thereupon becomes entitled to all the remedies for rent that the lessor originally had, even without an attornment. Thus the Revised Statutes of New York declare, that "the grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies by *entry*, action, distress, or otherwise, for the non-performance of any agreement contained in the lease so assigned, &c., as their grantor, or lessor had, or might have had, if such reversion had remained in such lessor or grantor."¹ But in order to confer upon such assignee a right to distrain, the lease or land should be included in the assignment; for a mere transfer of *the rent remaining unpaid*, which is only the transfer of a chose in action, does not carry with it the remedy by distress.²

§ 569. Any one of several joint tenants, being seised *per mi et per tout*, may distrain alone for the whole rent, although he must afterwards avow jointly with his companions, or make cognizance as their bailiff, and account to them for their respective shares. He may, therefore, appoint a bailiff to distrain for the whole rent, without the assent of his fellows.³ But coparceners before partition are considered but as one heir, and must, therefore, all join;⁴ after partition, however, they may make several distresses.⁵ Tenants in common, not holding by one title and possessing several estates, although they may join in an action for rent,⁶ must distrain severally for their respective portions and avow separately.⁷ But upon a lease by tenants in common, the survivor of them may distrain for the whole rent, although the reversion be to the lessors according to their respective interests.⁸

§ 570. A husband and wife may join, or the husband may distrain alone, for rents accruing from his wife's lands during the coverture.⁹ As guardians may grant leases, so they may distrain

¹ 1 R. S. 747, § 28.

² *Slocum v. Clark*, 2 Hill, 475.

³ *Pullen v. Palmer*, 3 Salk. 207; *Robinson v. Hoffman*, 4 Bing. 562; *Leigh v. Shepherd*, 2 B. & B. 465.

⁴ *Steadman v. Bates*, 1 Salk. 890.

⁵ Co. Lit. 168, b.

⁶ *Midgley v. Lovelace*, Carth. 289.

⁷ *Whitley v. Roberts*, 1 McClel. & Y. 107; *Harrison v. Barnsby*, 5 T. R. 246; *Snelgar v. Renston*, Cro. Jac. 611.

⁸ *Wallace v. McLaren*, 1 Mann. & R. 516.

⁹ *Bowles v. Poore*, Cro. Jac. 282; 2 Bulst. 233.

in their own names.¹ The executor of a lessor may distrain for arrears of rent due at the time of the testator's death;² but not for rent which has accrued subsequently to the death of the testator; for such rent, following the reversion, goes to the heir or devisee.³ A receiver in chancery may distrain without any special order of the court.⁴ But if there is a doubt in whom the legal right exists, he should get an order, as he must distrain in the name of the person having the legal right.⁵ If, however, he has leased the premises in his own name, the tenant cannot deny his right to distrain, although he appears by the lease to be only a receiver, and the rent is reserved to him in that character.⁶

§ 571. At common law, a mortgagee, after giving notice of the mortgage to the tenant in possession, under a lease made prior to the mortgage, is entitled to such rent as shall be in arrear at the time of the notice, and to the rent accruing afterwards, and may distrain for it after such notice.⁷ But in New York we have seen the mortgagee cannot have possession of the mortgaged premises, and is consequently not entitled to the rents of the estate; he cannot, therefore, under any circumstances be entitled to distrain, unless in the case of a tenant who attorns to the mortgagee after the forfeiture, which is allowed in New York, and in New Jersey.⁸ Neither is the common-law doctrine on this subject recognized in Pennsylvania.⁹ But as to a lease made by a mortgagor after the mortgage, the mortgagee cannot distrain until after he has received rent from the tenant;¹⁰ or given the tenant notice to pay rent to him, and received his consent;¹¹ for this is equivalent to the creation of a tenancy from year to year, between the mortgagee and tenant, on the terms of the original lease. And although the mortgagee cannot compel the payment of rent from the tenant under these circumstances, yet, in such case, the tenant will be justified in attorning and paying rent to the mortgagee.¹²

§ 572. At common law the lessor could only distrain during the

¹ *Bennet v. Robins*, 5 C. & P. 379; *Shopland v. Ryoler*, Cro. Jac. 55; s. c. *ib.* 98.

² *Duppa v. Mayo*, 1 Wms. Saund. 237; 1 R. S. 747, § 21.

³ *Wright v. Williams*, 5 Cow. 501.

⁴ *Pitt v. Snowden*, 3 Atk. 750.

⁵ *Hughes v. Hughes*, 3 Bro. Ch. 87.

⁶ *Dancer v. Hastings*, 4 Bing. 2.

⁷ *Moss v. Gallimore*, Doug. 279; *Sanders v. Van Sickle*, 3 Halst. 818.

⁸ *McKircher v. Hawley*, 16 Johns. 289; 1 R. S. 744.

⁹ *Meyers v. White*, 1 Rawle, 353.

¹⁰ *Rogers v. Humphreys*, 4 Ad. & E. 299.

¹¹ *Doe v. Boulter*, 6 Ad. & E. 675; *Maggill v. Hinsdale*, 6 Conn. 434.

¹² *Jones v. Clark*, 20 Johns. 51; *Pope v. Biggs*, 9 B. & C. 245; *Smith v. Shepard*, 15 Pick. 149.

continuance of the term ; for, according to feudal principles, there must be a privity of estate between the tenant and the person distraining. The remedy was consequently gone upon the determination of the term, as the privity of estate was thereby destroyed, and for the last instalment of rent, accruing on the last day of the term, there was no right of distress, or any remedy but by action.¹ But the statute of 8 Anne, c. 14, which has been generally adopted in the United States, provided that the distress might be made at any time within six months after the determination of the lease, if the landlord's title or interest still continued, and the tenant remained in possession.² As by this statute the landlord's interest must continue at the time of making the distress, if a tenant underlets, he cannot distrain upon the under-tenant after his own term has expired.³ The tenant must also appear to be in possession, to authorize such proceeding ; and, therefore, where the leased premises are certain *specific apartments* in a dwelling-house, and the tenant removes to *other apartments* in the same house, taking with him his goods, the landlord cannot, for the purpose of making a distress for the rent of the first apartments, follow the goods after six months subsequent to the termination of the lease of those apartments.⁴ Nor does the statute intend to permit a landlord to distrain upon the goods of a succeeding tenant found on the premises, who has taken possession under a new and different demise, occupying under a different right, although derived from the landlord himself. Therefore where, on the expiration of a parol lease to two persons for a year, the landlord executed a new lease for years to one of them, who continued to occupy the premises alone ; it was held that his goods could not be distrained upon for the rent of the preceding tenancy, though they were on the premises when the rent fell due and had remained there ever since.⁵ The goods of a third person, however, remaining on the premises during the time a tenant holds over, may be distrained for the rent of the original term, though more than six months have elapsed since that term expired.⁶

§ 573. With respect to the *time* of making a distress, it is to be observed that a distress can only be taken for rent in arrear ; and

¹ *Buszard v. Capel*, 8 B. & C. 141.

² *Terboes v. Williams*, 5 Cow. 407 ; s. c. 2 Wend. 148 ; *Christman v. Floyd*, 9 Wend. 340.

³ *Burne v. Richardson*, 4 Taunt. 720.

⁴ *Bukup v. Valentine*, 19 Wend. 554 ;

Taylorson v. Peters, 7 Ad. & E. 110.

⁵ *Bell v. Potter*, 6 Hill, 497.

⁶ *Webber v. Shearman*, 8 Hill, 547 ; s. c. 6 Hill, 20.

as rent does not become due until the last moment of the day when it is made payable, a distress cannot be taken until the next day after the rent becomes due.¹ But a warrant given on that day, to make distress generally, is good;² and if by the custom of the country, or by express stipulation between the parties, the rent be payable on the day on which the tenant enters, it may be distrained for on that day.³ It cannot be made in the night, but must be taken in the daytime, after sunrise and before sunset.⁴ Nor can it legally be made after a tender of payment; and a tender after distress, but before impounding the goods, will render the detainer illegal;⁵ though this would not be the effect of a tender after the distress is actually impounded.⁶ Where a lease stipulates that the rent shall be paid in advance, the landlord may distrain for it immediately upon the tenant taking possession of the premises;⁷ or if by the custom of the country, a distress may be taken for half a year's rent in advance, the custom is valid and forms part of the contract.⁸

§ 574. At common law, a distress can only be made upon some part of the demised premises out of which the rent issues.⁹ Upon any part of these it may be taken for the whole rent, even though the different parts be in different counties, because the whole rent issues out of every part of the land.¹⁰ And if a rent-charge issue out of land in the possession of many tenants, a distress may be taken upon the premises of one for the whole rent, for it issues out of each part. But where there are separate and distinct demises, there must be separate distresses on the several premises subject to each distinct rent, although the several premises are demised to the same tenant.¹¹ As rent cannot issue out of a mere easement, or incorporeal hereditament, upon the demise of a room, with a right of common passage along an entry leading from such room into the public street, it was held that the landlord could not seize goods of the tenant kept in such common passage.¹² For the same

¹ *Gano v. Hart*, Hardin 297; *Duppa v. Mayo*, 1 Saund. 287; 1 Inst. 47, b, n. 6.

² *Glaus v. Hart*, Hardin, 297.

³ *Russell v. Doty*, 4 Cow. 576; *Williams v. Howard*, 8 Munf. 277; *Beyer v. Fenstermacher*, 2 Whart. 95; *Buckley v. Taylor*, 2 T. R. 600.

⁴ *Co. Lit.* 142, a; *Aldenbergh v. People*, 6 C. & P. 212.

⁵ *Hunter v. Le Conte*, 6 Cow. 728.

⁶ *Firth v. Purvis*, 5 T. R. 482.

⁷ *Diller v. Roberts*, 18 S. & R. 60; *Russell v. Doty*, *supra*; *Peters v. Newkirk*, 6 id. 108; *Harrison v. Barry*, 7 Price, 690; *Williams v. Howard*, 8 Munf. 277.

⁸ *Buckley v. Taylor*, 2 T. R. 600.

⁹ *Burr v. Van Buskirk*, 3 Cow. 269; *Pemberton v. Van Rensselaer*, 1 Wend. 309; *Brown v. Duncan*, Harper, 338.

¹⁰ 1 Rol. Abr. 671, l. 10.

¹¹ *Rogers v. Birkmire*, Stra. 1040.

¹² *Winslow v. Henry*, 5 Hill, 481.

reason, a barge attached to a wharf by a rope was held in England not distrainable for rent of the wharf, though the land on which the wharf stood was demised, and the use of the land in the river Thames opposite to it, between high and low water mark, was also demised as appurtenant to the wharf, but not the land itself over which the barge floated when it was distrained.¹ The owner of a wharf, however, may distrain for wharfage on any goods or chattels on board a ship or vessel which has been moored at his wharf, although the vessel has been removed from the wharf; and it is no objection to the distress that it is made at a place different from where the wharfage accrued, provided such place be within the jurisdiction authorizing the proceeding by distress.²

§ 575. If, when the landlord comes to distrain cattle which he sees within his fee, the tenant or any other person, to prevent the distress, should drive the cattle away into some other place, the landlord may follow and take them; for in judgment of law, the distress will be considered as taken within his fee. But he cannot distrain them if they go off the premises of their own accord; nor can he pursue them if they have gone away before he discovered them.³ So a constable of the town where the demised premises are situated, to whom a warrant is delivered to be executed, may pursue into another town, and take goods which have been fraudulently removed to avoid the distress.⁴ At common law, if a stranger sent his horse or cattle upon the demised premises to pasture,⁵ or the cattle of a stranger broke through the fences and entered the tenant's land, they became immediately distrainable.⁶ It is so, also, if the owner of cattle is bound to repair the fences, and, by his negligence in not repairing, his beasts escape into a neighbor's land.⁷ But when there are no sufficient fences to divide the tenant's from the stranger's lands, and it is the tenant's duty to keep the fences in order, the landlord cannot distrain such cattle, until after the owner has had notice to remove them: and then if he neglects they become liable.⁸

§ 576. The American statutes, following that of 11 Geo. II. c. 19 in general furnish another exception to the rule, that the distress

¹ *Buzard v. Capel*, 8 B. & C. 141; s. c. 6 Bing. 150.

² *Nicholl v. Gardner*, 18 Wend. 288.

³ 1 Inst. 161, a.

⁴ *Christman v. Floyd*, 9 Wend. 840.

⁵ *Francis v. Wyatt*, 8 Burr. 1498.

⁶ Co. Lit. 74 b; *Webber v. Tivill*, 2 Saund. 124.

⁷ *Gill v. Gavin*, 2 Roll. 124.

⁸ *Lutw.* 1580; *Dyer*, 817, b.

can only be taken on the demised premises, by allowing the landlord to pursue and seize them, where they have been fraudulently removed for the purpose of avoiding the distress. The English statute only applies where the removal has occurred *secretly* and fraudulently;¹ and the landlord is bound to show, also, that no sufficient distress remained on the premises after such removal.² In Pennsylvania, the goods must have been removed after the rent became due, to authorize the landlord to follow them;³ and such removal must be fraudulent.⁴ In Louisiana, if the tenant removes his goods from the premises, and abandons them, he becomes liable at once for the rent of the whole term, due and to become due; but the execution only issues for the rent actually payable as it becomes due.⁵ In Kentucky, where the tenant is about to remove his effects, an attachment for rent lies before it is due if the rent be payable in money.⁶ There are similar statutes in Virginia and Kentucky, authorizing a distress after the tenant has removed his effects from the premises.⁷

§ 577. This statute applies only to the goods of the original lessee and his assignee, which have been removed from the demised premises; and not to those of a *stranger* found on the premises,⁸ or to goods taken by a creditor therefrom with the assent of the tenant, in payment of a *bond fide* debt, though the creditor knows the rent is due, and apprehends the landlord may distrain.⁹ Nor does it apply to the goods of an under-tenant, which have been removed before the rent became due;¹⁰ a plea that justifies the following of goods off the premises must, therefore, aver that they were the tenant's goods.¹¹ A mortgagee is deemed a tenant *sub modo*, and protected within the saving clause of the statute in favor of subsequent purchasers in good faith; and, therefore, personal property taken by a *bond fide* mortgagee from the premises, by virtue of the mortgage, is not subject to pursuit after removal.¹² But this right is a strict legal right, and not favored in equity. Rent is a lien upon the tenant's goods so long as they remain upon the demised prem-

¹ Opperman v. Smith, 4 D. & R. 88.

² Parrey v. Duncan, Mood. & M. 588.

³ Grace v. Shively, 12 S. & R. 217.

⁴ Purfel v. Sands, 1 Ashm. 120.

⁵ Reynolds v. Swain, 18 La. 198.

⁶ Poer v. Peebles, 1 Ky. 1; 8 Kent, 482 n.

⁷ Lougee v. Cotton, 2 Ky. 116.

⁸ Frisbey v. Thayer, 25 Wend. 896; Martin v. Black, 9 Paige, 641.

⁹ Slocum v. Clark, 2 Hill, 475; Coles v. Marquand, *ib.* 447; Adams v. LaComb, 1 Dall. 440; Davis v. Payne, 4 Rand. 382.

¹⁰ Acker v. Witherell, 4 Hill, 112.

¹¹ Thornton v. Adams, 5 M. & S. 88; Postman v. Harrell, 6 C. & P. 225.

¹² Frisbey v. Thayer, *supra*. But see Reynolds v. Shuler, 5 Cow. 828.

ises, and, at common law, the right was gone the moment they were removed, for the landlord had parted with his lien; possession, or what is equivalent to possession, being necessary to the existence of a lien.¹ But this statute, which gives him a right to follow them after their removal, does not continue such lien after the removal; it simply provides an additional remedy, without creating a new lien upon the goods. And as equity never interferes in behalf of a creditor who has not acquired a lien upon his debtor's property or to restrain the latter from making any disposition of his property he may think proper, it will not compel a defendant to disclose where the goods which have been removed have been deposited, in order that they may be seized by a distress warrant or delivered up to be sold under a decree, to satisfy the rent.²

§ 578. When a landlord makes a distress, he may seize upon any article in the name of all the goods in the house;³ and a declaration by him, that nothing should be removed until his rent was paid, has been held sufficient to authorize him to follow an article which had been removed.⁴ So where a broker went into the tenant's house and pressed for payment of rent alleged to be due, and a sum for the expenses of the levy, but touched nothing, and made no inventory, and the tenant then paid the rent and expenses under protest; it was held, in an action against the landlord for an excessive distress, that he could not say there had been no distress.⁵ He may enter into any house or building, either through the doors or windows;⁶ but if these be fastened, he cannot lawfully break them open, for enclosures or fences cannot be broken to take a distress.⁷ And where a padlock had been put upon a barn door, the landlord was held to be a trespasser by breaking it, in order to seize the corn in the barn.⁸ But if the outer door be open, the inner may be broken;⁹ and this, though such inner room is in the exclusive possession of the plaintiff, under an occupation separate from the rest of the house; or if, after having once entered lawfully, the officer

¹ *Trappan v. Morie*, 18 Johns. 1; *Williams v. Leper*, 8 Burr. 1889; *Sweet v. Pym*, 1 East, 4; *McCombie v. Davies*, 7 *id.* 5.

² *Reed v. Darrow*, 2 Edw. 412; *Wiggins v. Armstrong*, 2 Johns. Ch. 144.

³ *Dod v. Monger*, 6 Mod. 215.

⁴ *Wood v. Nunn*, 5 Bing. 10.

⁵ *Hutchins v. Scott*, 2 M. & W. 809.

⁶ 1 Rol. Abr. 671, l. 7, 17.

⁷ Co. Lit. 161, a; *Semayne's case*, 5 Co. 91.

⁸ 9 Vin. Abr. 128, pl. 6.

⁹ *Williams v. Spencer*, 5 Johns. 352; *Comb. 17*; *Brown v. Dunn*, Bull. N. P. 81; *State v. Thackam*, 1 Bay, 358; *Ratcliffe v. Burton*, 3 B. & P. 223; *State v. Armfield*, 2 Hawks, 246.

is forcibly turned out of possession, he may break the door and re-enter.¹ To make an officer a trespasser, it is enough that the outer door be shut; lifting a latch is as much a breaking, in law, as the forcing a door bolted with iron; whatever would be a breaking of an outer door in burglary is an unlawful breaking by a sheriff; even the sliding-down of a window, fastened by pulleys, would be such a breaking.² And if an officer breaks open an enclosure, and takes goods when he is not justified in doing so, he not only renders himself liable to an action of trespass, but the court or a judge will restore the goods to the person from whom they were so taken.³

§ 579. At common law, a distress might be levied by the landlord or any private person authorized by him for that purpose, although he could not sell the property so distrained; but the English, as well as the American, statutes regulating distresses, now require as a check to abuse in the exercise of this right, that the proceeding shall be conducted by a legal officer.⁴ In Georgia, a distress warrant can only be granted by a justice of the peace.⁵ Still further to protect the rights of the tenant, the statutes of the different States require a preliminary affidavit to be made by a landlord previous to taking a distress for rent, in regard to which great particularity is necessary to be observed, for as the affidavit of rent due is the foundation of the whole proceeding, any material error in it will vitiate all future transactions, and render the landlord a trespasser.

§ 580. In addition to this affidavit, the landlord must also give to the officer he employs, an authority, in writing, called in the statute the "warrant of distress." As to which no particular form is necessary: if it substantially indicate the object intended, so as to enable the officer to execute it, it is sufficient; nor need it be under seal.⁶ Neither is it necessary that an agent who directs the distress should have written authority from the landlord, for the statute only requires that the officer making the distress should act under a warrant in writing, and, therefore, an agent of the landlord may sign the warrant as agent for his principal, and make the

¹ *Eagleton v. Gutteridge*, 11 M. & W. 465. *Wells v. Hornish*, 8 Penn. 38; *Smiths v. Ambler*, 1 Munf. 596.

² *Curtis v. Hubbard*, 1 Hill, 386.

⁵ *Prince's Dig.* 1837, p. 687.

³ 1 Chit. Arch. Pr. 7th edit. 410; 2 Bac. Abr. Execution (N).

⁶ The warrant of distress need not set out a description of the premises. *Alwood v. Mansfield*, 38 Ill. 452.

⁴ *Ferguson v. Moore*, 2 Wash. 58;

affidavit also.¹ At common law, if an agent or bailiff proceeds to distrain goods without an express authority from his principal, and the principal afterwards assent to it, it is a good distress, and shall have relation back to the time when the distress was taken.² But a distress warrant signed by "A. agent for B." is a good execution of the authority conferred on the agent.³

§ 581. All the arrears of rent, arising during the tenancy, may be included in one proceeding, though the rent of several years should happen to be in arrear, since the statute of limitations does not apply to these cases.⁴ And, therefore, if a tenant enters upon the premises under a lease for two years, and continues in possession nine years, paying no rent, the landlord may, by one distress, remunerate himself for the rent accrued during the whole nine years; and so for any other period. And if the property be taken from his possession by a writ of replevin, he may in one avowry acknowledge the taking for the whole nine years, as upon one entire lease.⁵ A distress, however, can only be taken for rent, and not for damages for the delay of payment, and therefore interest cannot be included in the amount distrained for; and if interest is collected by a distress, the party distrained upon may recover back the excess by an action on the case.⁶

§ 582. When the officer has been thus legally authorized to distrain, he enters upon the premises, and makes a seizure of such things as are liable for rent; and proceeds to take an inventory of so many goods as he shall judge to be sufficient to cover the rent distrained for, together with the charges of the distress. And it is generally proper for him to have a person with him when he makes the distress, and also when he serves the inventory and notice, to examine the same, and attest, if there be occasion, to the regularity of the proceedings. The safest way perhaps is, to remove the goods immediately to some convenient place, and, in the notice required by the statute, to inform the tenant where they have been carried; but it is usual to let them remain on the

¹ *Bigelow v. Judson*, 19 Wend. 229. No written authority is required in Pennsylvania. *Franciscus v. Reigart*, 4 Watts, 98; *Jones v. Gundrim*, 8 W. & S. 581.

² *Gilbert on Distresses*, 32; *Duncan v. Meikleham*, 3 C. & P. 172; *Wood v. Nunn*, 5 Bing. 10.

³ *Bigelow v. Judson*, *supra*; *Stackpole v. Arnold*, 11 Mass. 27; *Brockway v. Allen*, 17 Wend. 40.

⁴ *Braithwaite v. Cooksey*, 1 H. Bl. 465; *Wright v. Williams*, 5 Cow. 501; *Blake v. Dellesseline*, 4 McCord, 496.

⁵ *Sherwood v. Philips*, 18 Wend. 479; *Vechte v. Brownell*, 8 Paige, 212.

⁶ *Lansing v. Rattoone*, 6 Johns. 43; *Bantleon v. Smith*, 2 Binn. 153; *Dennison v. Lee*, 6 Gill & J. 383; *Vechte v. Brownell*, *supra*; *Skerry v. Preston*, 2 Chit. 245.

premises until they are sold, leaving a person in charge, or taking security for their forthcoming.

§ 583. As to the goods that may be taken upon a distress for rent, they are in general all the movable goods and chattels which may be found upon the premises, whether they be the goods of the tenant, under-tenant, or other person.¹ The necessity of this rule is obvious, when we consider by what varieties of fraud and collusion the rights of a landlord are liable to be defeated, if he is to be restricted to such goods only as he can prove to be the property of the tenant. Nor is there in reality any hardship in it, as a stranger, who may happen to have his goods upon the premises, can, at any time before the landlord actually levies his distress, remove them, and the landlord has no right to follow them. In Virginia, Kentucky, Illinois, and New Jersey, the property of strangers found upon the premises is exempt from distress, by the statutes of those States.² And in Pennsylvania it has been held, that the effects of a lodger and boarder are exempt from distress for rent due from the keeper of the boarding-house;³ and that wherever a landlord knows, or consents to the introduction of a stranger's goods upon the premises, as a consequence of the business acts of the tenant, such goods shall not be distrained.⁴ So in New York it was held, that if a stranger's goods are on the demised premises without his fault, and he endeavors to regain them with due diligence, and without any voluntary delay, they are not distrainable.⁵

§ 584. The tendency of our decisions is, upon the whole, against the right of distraining goods not the property of the tenant;⁶ but, it has been observed, that to abrogate it altogether, might lead to results not sufficiently adverted to. Independent of the fraud which might be perpetrated, and the delay that would occur, were the tenant permitted to set up, as a defence to a distress for rent, property in a third person; the abolition of the right to distrain all goods on the premises not exempt at common-law would prevent the landlord from distraining the goods of an under-tenant, who, not being liable to him for rent in any form of action, by reason of

¹ *Holt v. Johnson*, 14 Johns. 425; *Spencer v. McGowen*, 13 Wend. 256; *Thorn-ton v. Adams*, 5 Maule & S. 38; *Kessler v. McConachy*, 1 Rawle, 485; *O'Donnell v. Seybert*, 13 S. & R. 57; *Weidell v. Ros-berry*, *ib.* 180; *Howard v. Ramsay*, 7 Har. & J. 113; *Davis v. Payne*, 4 Rand. 332; *Reeves v. McKenzie*, 1 Bailey, 497.

² 4 Rand. 334; *Snyder v. Hitt*, 2 Dana, 204, 212; *Elmer's (N. J.) Dig.* 135; *Rev. Laws of Illinois*, 1833.

³ *Riddle v. Welden*, 5 Whart. 1.

⁴ *Brown v. Sims*, 17 S. & R. 138.

⁵ *Gilbert v. Moody*, 17 Wend. 354.

⁶ *Connah v. Hale*, 23 Wend. 475.

a want of privity of estate or of contract, is a mere stranger to the landlord. And if the right of distraining the property of a stranger is refined away by judicial decisions, any lessee, by redemising the whole property which has passed to him under a lease, and reserving to himself but a single day of the original term as his reversion, may altogether defeat the right of distress. In fact, the principle laid down in the Pennsylvania case above referred to, that where the landlord knows or consents to the introduction of a stranger's goods on the premises as a consequence of the business acts of the tenant, such goods shall not be distrained, may well embrace the goods of an under-tenant, placed on the premises by the contract of the first lessee, with the consent, express or implied, of the landlord.

§ 585. The statute laws of most of the States contain a variety of exemptions from distress, generally embracing the necessary tools of a mechanic, or for limited agricultural purposes.¹ Thus the statute of Alabama, of 1832, exempts two cows and calves, five hundred pounds of meat, one hundred bushels of corn, all books, a pair of working oxen, all tools or implements of trade, twenty head of hogs, &c. The laws of Michigan exempt all private libraries not exceeding a hundred dollars in value. The statute of Georgia, of 1841, in favor of heads of families, exempts twenty acres of land, and an additional five acres for each child under fifteen years of age, provided the land derives its chief value from its adaptation to agricultural purposes. If the party owns more than twenty acres, he is to procure twenty acres to be laid off, so as to include the dwelling-house and improvements on the tract, not exceeding twelve hundred dollars in value; and this cannot be molested. He is also entitled to one horse, ten head of hogs, &c. So by the Act of 1849, property in Pennsylvania, to the value of three hundred dollars, exclusive of all wearing apparel of the tenant and his family, and all Bibles and school-books in use in the family, is exempted from distress as well as from levy and sale on execution. . But the limits of our work do not permit us to go into all these statutory exemptions; and the details will appear more satisfactorily, from a particular examination of the statutes themselves.

§ 586. There are, however, many exceptions at common law

¹ Acts of Maine, 1883, c. 807; State v. 5 Mass. 318; Patten v. Smith, 4 Conn. Haggard, 1 Humph. 890; Dailey v. May, 450; McDowell v. Shotwell, 2 Whart. 26.

independent of the statutes, arising either from the circumstance that a distress was formerly considered as a mere pledge to the landlord for the payment of his rent; or from the care which the law takes, that while the interest of an individual is served, the common good of the public shall not be prejudiced. Thus things which cannot, with certainty, be identified, or which cannot be returned to the owner in as good a condition as at the time they were taken, are exempt. For it would be inconsistent with the notion of a mere pledge, that it could not be returned in specie; and it would be unjust to take such things as might be injured and lost to the lessee by the detention. For this reason, loose money, meal, or the like, not confined in a bag or sack, and, consequently, bearing no mark by which it may be known, cannot be distrained; but, when enclosed in a bag, which may itself be marked and known, and so identified, the objection ceases. The exception also extends to things of a perishable nature, such as fruit and milk.¹

§ 587. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed, in the way of his trade or employ, have always been privileged for the sake of trade and commerce, which could not be carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are.² Therefore, things sent to places of trade, as a horse sent to a farrier's shop, shall not be distrained for the rent of the shop; nor yarn sent to a weaver's; nor cloth to a tailor's,³ whether it be made up into garments or not; nor sacks of corn sent to a mill to be ground, or to a market to be sold.⁴ For the same reason, the goods of a principal, in the hands of a factor or consignee for sale, cannot be distrained for rent due from the factor;⁵ nor can goods consigned to a broker for sale, and placed by him for safe-keeping in a warehouse over the wharf at which they were landed, be distrained for rent due in respect of the wharf or warehouse.⁶ A horse sent to market with corn for

¹ *Cooper v. Pollard*, 1 Rol. Abr. 667, l. 16; *Given v. Blann*, 3 Blackf. 64; *Morley v. Pincombe*, 2 Exch. 101.

² 1 Inst. 47, a; *Wilson v. Duckett*, 2 Mod. 61; *Simpson v. Hartopp*, Willes, 512. The lessor of a cotton press has no lien or pledge, for the payment of his rent, on cotton sent there by third persons to be pressed. *Rea v. Burt*, 8 La. 509.

³ *Hoskins v. Paul*, 4 Halst. 110; *Wood v. Clarke*, 1 Cr. & J. 484.

⁴ Co. Lit. 47 a. In Louisiana, the landlord has a privilege by way of pledge, on the tools of a tradesman found on the premises. *Parker v. Starkweather*, 19 Martin, 337.

⁵ *Gilman v. Elton*, 3 Brod. & B. 75; *Brown v. Sims*, 17 S. & R. 138; *Himeley v. Wyatt*, 1 Bay, 102; *Matthias v. Mesnard*, 2 C. & P. 353.

⁶ *Thompson v. Mashiter*, 1 Bing. 283.

sale is protected ; or to a mill with corn to be ground, and remaining at the mill-door during the grinding.¹ So, where a man sent a horse laden with yarn to a neighbor's to be weighed, whose landlord just then entered with a distress warrant, it was held, that neither the horse nor the yarn was distrainable ; goods being privileged and protected under all such circumstances for the benefit of trade.²

§ 588. The exemption seems to be general in all cases where the course of business necessarily puts the tenant in temporary possession of the property of his customers.³ Upon this principle, horses and carriages standing temporarily at an inn are privileged.⁴ But if standing at livery, they are distrainable.⁵ In South Carolina, however, it has been held, that a horse standing at a livery stable is not, for reasons of public policy, distrainable ;⁶ nor for the same reason, a negro boy bound out as an apprentice to learn a trade, accidentally found upon the premises.⁷ So, also, goods deposited in a warehouse for storage are not liable to distress ; for the course of such business necessarily puts a tenant in possession of the property of his customers, and it would be against the dictates of conscience to allow the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp.⁸ Under the Massachusetts law of attachment upon *mesne* process, which is analogous to the common-law doctrine of distress for rent, it has been held that a stage-coach at a tavern, in preparation, and nearly ready for departure, might be attached ; and the court inclined to the opinion, that steamboats, vessels, and stage-coaches, in actual use, might also be attached.⁹

§ 589. At common law, goods delivered to a common carrier, or other person, to be conveyed for hire, are privileged ;¹⁰ so of goods on the premises of an auctioneer, deposited there for the purpose of sale ;¹¹ or a beast sent to the premises of a butcher, to be slaughtered.¹² But, although materials delivered by a manufacturer to a weaver, to be by him manufactured at his own house, are privileged from the weaver's rent ; yet the frame of other machinery

¹ 2 Bac. Abr. Distress, B.

² Read v. Burley, Cro. El. 549.

³ Himeley v. Wyatt *et al.*, 1 Bay, 102 ;

Walker v. Johnson, 4 McCord, 552.

⁴ Co. Lit. 47, 7.

⁵ Francis v. Wyatt, 8 Burr. 1498.

⁶ Youngblood v. Lowry, 2 McCord, 39.

⁷ Phaelon v. McBride, 1 Bay, 170.

⁸ Brown v. Sims, 17 S. & R. 138 ;
Walker v. Johnson, 4 McCord, 552.

⁹ Potter v. Hall, 3 Pick. 868.

¹⁰ Gisbourn v. Hurst, 1 Salk. 250 ; Read
v. Burley, *supra*.

¹¹ Adams v. Grane, 8 Tyrw. 326 ; s. c. 1
Cr. & M. 380 ; Himeley v. Wyatt, 1 Bay, 102.

¹² Brown v. Shevill, 2 Ad. & E. 138.

delivered by the manufacturer to the weaver, with the materials to be used in such manufacture, are not privileged unless there are other goods on the premises to satisfy the rent.¹ On the same principle, a barge sent by a customer to the premises of a salt manufacturer to be loaded with salt was not protected;² nor a brewer's casks sent to a public house with beer.³

§ 590. If the landlord either expressly or impliedly consent, that chattels placed by a stranger on the tenant's land shall be exempt from distress, he will be a trespasser if he afterwards distrains them.⁴ Goods deposited with another to await an opportunity to be sold, are not liable to distress or sale for rent owing by the bailee. The law, in affording this protection, looks to the convenience of trade, and not to the business of the bailee, or the particular character of the place where the goods are deposited; as whether it be a warehouse, wareroom, wharf, or other place of deposit. The clause in the statute exempting from distress, or sale for rent, goods deposited with the keeper of any warehouse in the usual course of his business, is put merely by way of example, and not intended to limit the protection only to goods thus deposited.⁵ It was also laid down by Mr. Justice Park, that this principle of exemption extends to every species of trade; not on account of the character of the individual in whose hands they were deposited, but for the benefit of trade generally, which alone is to be considered, and for which only goods are by law to be favored and protected.⁶

§ 591. As every thing which is distrained is presumed to be the property of the occupant, things wherein a man can have no absolute and valuable property, cannot, for this reason, be distrained; as deer, cats, rabbits, and all wild animals, which are *feræ naturæ*.⁷ Yet, if such animals are kept in a private enclosure, for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock, or merchandise, that they become distrainable.⁸ A dog may be valuable property, and is, therefore, distrainable.⁹ So is the negro of a stranger accidentally on the premises.¹⁰

¹ Wood v. Clarke, 1 Tyrw. 814; Fenton v. Logan, 9 Bing. 676.

² Muspratt v. Gregory, 1 M. & W. 688.

³ Joule v. Jackson, 7 M. & W. 450.

⁴ Horsford v. Webster, 5 Tyrw. 409.

⁵ Connah v. Hale, 28 Wend. 462.

⁶ Mathias v. Mesnard, 2 C. & P. 353.

⁷ Co. Lit. 47, a.

⁸ Davis v. Powell, Willes, 50.

⁹ Willes, 48.

¹⁰ Bull v. Horlbeck, 1 Bay, 301.

§ 592. Things affixed to the freehold, although belonging to the tenant, cannot be distrained so long as they remain affixed to the premises. But if they are permanently separated by the tenant or his agent, with a view of applying them to some other purpose, — in which case they would, in fact, no longer have the character of fixtures, — or with a view of removing them from the premises altogether, they become distrainable, although they may have passed into the hands of a *bond fide* mortgagee, who removed them in order to secure himself under his mortgage. For a mortgage of goods is not such a sale as will protect them from distress.¹

§ 593. If a tenant quits possession at the end of his term and sells his goods to a succeeding tenant, they cannot be distrained for arrears of rent due by the former tenant.² And, as a general rule, goods which have been sold *bond fide* and for a valuable consideration before the seizure, are not distrainable unless they are suffered to remain an unreasonable time upon the premises after the sale.³ And where goods of a tenant are sold under an execution, a reasonable time to remove them will be allowed to the purchaser; but there must be no unnecessary delay in the removal, otherwise they become distrainable. Therefore where they were sold on the afternoon of Saturday and distrained upon the following Tuesday, the distress was held good, because no reason was assigned for their remaining on the premises in the mean time.⁴

§ 594. Goods in custody of the law, as a distress taken *damage feasant*, cannot be distrained;⁵ but in a case where the plaintiff in replevin was nonsuited, the avowant was allowed to distrain the same goods for rent since accrued, before the execution of the writ, *de retorno habendo*.⁶ And when goods were seized by the sheriff under an attachment against an absconding debtor, the landlord's right of distress was held not to have been taken away.⁷ Where property is rightfully in the hands of a receiver, it is in custody of the court, and cannot be distrained upon without permission of the court, by whom the receiver was appointed, and it is a contempt of court for a third person to attempt to deprive him of that possession in any manner whatever. But if the landlord has a claim upon such property for the recovery of rent, he may

¹ *Vausee v. Russel*, 2 McCord, 829; *Cresson v. Stout*, 17 Johns. 116; *Reynolds v. Shuler*, 5 Cow. 828; *Darby v. Harris*, 1 Q. B. 896.

² *Clifford v. Beems*, 8 Watts, 246.

³ *Neale v. Clautice*, 7 Har. & J. 872.

⁴ *Gilbert v. Moody*, 17 Wend. 864.

⁵ Co. Lit. 47, b.

⁶ *Hefford v. Alger*, 1 Taunt. 218.

⁷ *Acker v. Witherell*, 4 Hill, 112.

apply to the court for an order that the receiver pay the rent, or that the landlord be at liberty to proceed by distress or otherwise as he may be advised. If his claim is contested, the court will give him leave to go before a master, and be examined *pro interesse suo*.¹

§ 595. The same principles are applicable to every interference with the possession of a sequestrator committee or custodee, who holds the property as an officer of the court; as his possession is in law the possession of the court itself.² Therefore, where in a suit on a judgment creditor's bill, a receiver of the defendant's property was appointed in October, 1841, and the defendant afterwards assigned his property to such receiver; and at the time of his appointment the defendant was the tenant of certain premises, upon which on the first day of November, 1841, a quarter's rent became due; and afterwards the receiver took possession of the furniture on the premises, and removed it therefrom; and soon after such furniture was removed, and while it was on the carts in the street near the premises, the landlord attempted to distrain the same for rent in arrear, but was prevented from doing so by the prior possession of the receiver: it was held, that as the property was actually removed from the premises before the landlord attempted to exercise his right to distrain, his right of distress was gone; and that he had no right to follow the goods, as they were not the goods of the tenant at the time of their removal. But it was held at the same time, that if the term had been assigned to the receiver at the time of the assignment of the furniture, and the receiver had taken possession of the demised premises, or otherwise elected to take the term under the assignment, that he would have taken it *cum onere*, and, for the time being, would have been the tenant of the premises, and the removal of the furniture would have been a removal of the goods of the tenant, within the meaning of the statute.³ Property in a boarding-house, though belonging to a boarder, is not exempt if it be in actual possession and use of the tenant, by consent of the boarder, without the landlord's permission.⁴ But the supreme court of Pennsylvania held, that the goods of a boarder were not liable to distress for the rent of the house, on the ground that chat-

¹ Noe v. Gibson, 7 Paige, 518; Matter of Hopper, 5 id. 489; 2 Story's Equity, 177; Martin v. Black, 9 Paige, 641.

² *Ib.*; Jacob's Ch.; 572; Lees v. Waring, 1 Hogan, 218.

³ Martin v. Black, *supra*.

⁴ Matthews v. Stone, 1 Hill, 565.

tels so situated were within the reason of the law which protected the property of a stranger tarrying at an inn from being distrained for rent due on account of the premises. And the principle was said to be a growing one, and that it ought to embrace every case that could at all be brought within it.¹

§ 596. The houses of ambassadors or other public ministers of a foreign prince or state, and of their domestic servants, are, by the law of nations, inaccessible to the ordinary officers of justice, — being considered out of the jurisdiction of the country, — their goods are, therefore, for reasons of public policy, privileged from distress.² Such things as are in actual use are protected from distress, as the hatchet with which a man is working, the clothes he is wearing,³ or the horse he is riding;⁴ which exemption arises from the anxiety with which the law guards against any incitement to a breach of the peace. A cart loaded with grain is therefore said to be privileged if a man be upon it;⁵ and a stocking frame,⁶ or a weaver's loom, cannot be distrained while a person is employed upon it.⁷

§ 597. Nor will the common law permit beasts of the plough, sheep, and the implements of a mechanic's trade, to be distrained for rent, until other chattels sufficient for the demand cannot be found. But with respect to things thus conditionally privileged, it has been held, that even though there be a sufficient distress besides upon the premises, yet if that distress consist of growing crops, which are only distrainable by statute, and not immediately productive, the landlord is not bound to avail himself of it; but may distrain the things privileged *sub modo*.⁸ And if a landlord distrain, among other things, his tenant's cattle and beasts of the plough, and it turns out after the sale, that there would, in point of fact have been sufficient to satisfy the rent and expenses without taking them, such distress is not thereby proved to be illegal, if there were reasonable grounds for supposing (judging from appraisement), that without taking the beasts of the plough, there would not have been sufficient to have satisfied the rent and expenses when sold.⁹ Cattle belonging to a stranger, though in general liable to be taken if found upon the premises,¹⁰ are not so under particular circum-

¹ Riddle v. Welden, 5 Whart. 9.

² Vattel, book iv. ch. 9; Hopkins v. De Robeck, 8 T. R. 80.

³ Co. Lit. 47, a.

⁴ Storey v. Robinson, 6 T. R. 188.

⁵ Welch v. Bell, 1 Vent. 86.

⁶ Simpson v. Hartopp, Willes, 512.

⁷ Gorton v. Falkner, 4 T. R. 565.

⁸ Piggott v. Birtles, 1 M. & W. 441.

⁹ Jenner v. Yoiland, 6 Price, 3.

¹⁰ Read v. Burley, Cro. El. 549.

stances ; as if they are put upon the land by the owner for necessary refreshment while on their way to market.¹

§ 598. Goods of the tenant taken in execution, though remaining on the premises, cannot be distrained, because they are in the custody of the law ;² and, by the common law, the landlord lost his lien upon the tenant's goods after the sheriff had levied on them ; for an execution took precedence of all debts, except specific liens.³ But the statute of 8 Anne, c. 14, provided a remedy for a landlord to whom rent is due under these circumstances, by directing the sheriff to pay him not exceeding a year's rent, out of the proceeds of the property seized on the premises by the execution. No particular form of notice was required to be given to the sheriff under this statute ; the only inquiry for him to make was, whether rent was in fact due. Of this he was bound to inform himself, and was liable to the landlord for removing the goods from the demised premises without satisfying the year's rent.⁴ The Revised Statutes of New York — which, however, as we observed, have abolished this whole provision, giving a preference to an execution creditor for the collection of his rent — required that a written notice, with a verification in a certain form, should be served upon the sheriff ; and it was not in the power of the officer holding the execution to dispense with either, for being a summary power given by the statute, it must be strictly pursued.⁵

§ 599. The statute refers only to goods upon the premises, and does not extend to chattels real ; which may, therefore, be taken and sold to satisfy the execution, without any reference to the landlord's claim for rent.⁶ Should there be a year's rent due to the landlord at the time of levying the execution, and he omits to give notice to the officer of his claim until after the accruing of another year's rent, he is entitled to only one year's rent ; although, subsequent to the accruing of the second year's rent, new executions are levied upon the property by another officer, and notice of rent due is given to him by the landlord. Yet if he has given notice of his claim on the levy of the first execution, and gives alike notice on the levy of the second, he may be entitled to two years' rent.⁷ If

¹ *Poole v. Longueville*, 2 Wms. Saund. 290, n. (7).

² *Rex v. Cotton*, Park, 120 ; *Eaton v. Southby*, Willes, 136 ; *Hamilton v. Reedy*, 3 McCord, 40.

³ *Co. Lit.*, 47 b ; *Henchett v. Kimpson*, 2 Wils. 140.

⁴ *Andrews v. Dixon*, 8 B. & A. 645 ;

Olcott v. Fraser, 5 Hill, 562 ; *Farrington v. Bailey*, 21 Wend. 65.

⁵ *Frisbey v. Thayer*, 25 Wend. 396 ; *Millard v. Robinson*, 4 Hill, 604.

⁶ *Hamilton v. Reedy*, 3 McCord, 38.

⁷ *Van Rensselaer v. Quackenboss*, 17 Wend. 84.

the goods are taken in execution after the distress is levied, the landlord may go on and complete his distress, and also claim the accruing year's rent in preference to the execution creditor.¹

§ 600. The statute contemplates only a tenancy existing at the time of levying the execution; where, therefore, a sheriff seized goods under a writ of *fieri facias*, and a writ of *habere facias possessionem* was subsequently delivered to him in an ejectment, at the suit of the landlord, on a demise made previous to the *fi. fa.*; it was held, that the sheriff was not justified in allowing a year's rent to the landlord, as the tenancy must have ceased on the demise in the ejectment.² Nor will an agreement between a purchaser and vendor of real estate, where the consideration-money is to be paid in instalments, and the purchaser enters into possession, that the vendor may collect the moneys as they become due, by *distress or otherwise*, as for so much rent due, will not entitle the vendor to a preference over judgment creditors, as landlord of the demised premises, in case of a sale of the purchaser's property under execution, and notice given by the vendor, claiming the amount due on the contract *as rent*.³

§ 601. It is not material whether the goods seized under the execution belong to the tenant or to a third person; if they are upon the premises at the time of the seizure, they are liable for a year's rent, and cannot be taken away by the sheriff upon an execution, without paying the landlord the rent due him at the time of levying the execution.⁴ The landlord's lien, however, extends only to rent due previous to a levy made by the sheriff on the execution, and not for rent subsequently accruing while the goods remain on the premises in the possession of the sheriff.⁵ Nor is he entitled to the rent of the whole current year, but only to the amount due on the last quarter-day.⁶ And though there be several executions, he can claim no more than one year's rent;⁷ but this he is entitled to without any deduction for sheriff's poundage,⁸ although the sheriff may deduct such costs as were incurred before he received notice from the landlord.⁹

¹ Biddle v. Biddle, 3 Harringt. 589.

² Hodgson v. Gascoine, 5 B. & A. 88.

³ Sackett v. Barnum, 22 Wend. 606.

⁴ Spencer v. McGowan, 18 Wend. 256.

If the lease be of premises, with a right of way or passage appurtenant, a distress cannot be made of goods which are in the passageway. Winslow v. Henry, 5 Hill, 481.

⁵ Trappan v. Morie, 18 Johns. 1; Hoskins v. Knight, 1 Maule & S. 245.

⁶ Hazard v. Raymond, 2 Johns. 478.

⁷ Russell v. Doty, 4 Cow. 576; West v. Sink, 2 Yeates, 274.

⁸ Colyer v. Speer, 2 Brod. & B. 67.

⁹ Henchett v. Kimpson, 2 Wils. 140.

§ 602. None but the immediate landlord may avail himself of this provision of the statute, for the ground landlord cannot claim a year's rent upon an execution against the under-tenant;¹ nor is a sheriff liable to the landlord for removing the goods of such a tenant from the demised premises, leaving the rent unpaid.² And the statute only applies to cases where a judgment creditor claims adversely to the landlord, and not where the execution is sued out by the landlord himself. It was intended to protect a landlord against frauds which might be committed upon him by his tenant; particularly by his colluding with creditors to issue executions upon his goods. For after his property had thus been placed in legal custody by an execution, and could not be distrained, a judgment creditor, by keeping possession for a length of time, might seriously affect the interests of the landlord. The statute, therefore, only protects landlords against executions issued by third persons, and not by the landlord himself.³

§ 603. To compel the sheriff to pay over the year's rent, the landlord or his executor may move the court, out of which the execution issued, that he be paid the amount due to him out of the money produced by the levy, if it be sufficient for that purpose; and, if not sufficient, then that it be paid to him on account of his rent, so far as it will satisfy the same.⁴ And this motion may be made at any time before the sheriff has actually paid over the proceeds to the plaintiff in the execution; he being bound, upon receipt of the landlord's notice, to retain a year's rent out of the proceeds of the tenant's goods.⁵ The landlord may also have a special action on the case, for the sheriff's neglect to pay over such rent; for taking goods after receiving the landlord's notice, without leaving a year's rent on the premises;⁶ or for remaining upon the premises, an unreasonable length of time.⁷ And if, on receiving notice, he finds the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw.⁸ But, in order to recover against a sheriff, there must be an averment and proof of loss or damage sustained by the plaintiff, in

¹ *Ex parte Bennet*, Stra. 787.

² *Brown v. Fay*, 6 Wend. 392.

³ *Taylor v. Lanyon*, 6 Bing. 536; *Camp v. McCormick*, 1 Den. 641.

⁴ *Henchett v. Kimpson*, 2 Wils. 140; *Colyer v. Speer*, *supra*.

⁵ *Arnitt v. Garnett*, 8 B. & A. 440.

⁶ *Leery v. Godson*, 4 T. R. 687; *Duck*

v. Braddyll, McLel. 217; *Per Ld. Denman*, in *Ladd v. Thomas*, 12 Ad. & E. 117.

⁷ *Winterbourne v. Morgan*, 2 Camp. 117; *Hoskins v. Knight*, 1 Maule & S. 247.

⁸ *Foster v. Hilton*, 1 Dowl. P. C. 35; *Calvert v. Joliffe*, 2 B. & Ad. 418; *Brown v. Jarvis*, 5 Dowl. P. C. 231.

consequence of the neglect complained of, at least to the extent of being delayed or prejudiced in some way.¹ No action for money had and received to the landlord's use can be maintained for the amount of a year's rent.²

§ 604. In an action against the sheriff for removing goods taken in execution, without paying the landlord a year's rent, it is not necessary to prove that the year's rent is due; it is sufficient to show the occupation by the tenant; it then lies on the defendant to show that the rent has been paid. Such a claim may be supported for rent stipulated to be paid in advance; and may be distrained for by the landlord, although he is aware that an execution is about to be issued by a judgment creditor.³ If goods have been once removed under the execution, and the landlord has notified the sheriff to pay him a year's rent, they cannot be afterwards released and the execution withdrawn, without paying the landlord; because while they were in the custody of the law the landlord could not distrain them.⁴ The sheriff's liability attaches, if he removes any of the goods without retaining the rent; for the landlord cannot be called upon to show that the property remaining on the premises was not sufficient to satisfy his claim.⁵ But if, upon the goods of a tenant being taken in execution, an agent of the landlord takes from the sheriff's officer an undertaking for a year's rent, and then consents to the goods being sold, the landlord cannot afterwards maintain this action against the sheriff, although the rent is not paid according to the undertaking, and although the agreement is void under the statute of frauds, for not stating a consideration.⁶ After a sale under the execution, the goods are no longer in legal custody, and may, if they remain on the premises, be distrained by the landlord, notwithstanding the sale; therefore standing crops, though protected after the sale, until they are cut and a reasonable time has elapsed for their removal, if suffered to remain after such reasonable time has elapsed, cease to be protected, and become distrainable.⁷

§ 605. Formerly, as soon as a landlord distrained goods or chat-

¹ *Dyke v. Duke*, 4 Bing. N. C. 197; *Dean of Hereford v. Macknamara*, 5 D. & B. 95; *Beckford v. Montague*, 2 Esp. 475.

² *Green v. Austen*, 8 Camp. 260.

³ *Harrison v. Barry*, 7 Price, 690.

⁴ *Lane v. Crockett*, 7 Price, 566.

⁵ *Colyer v. Sheer*, 2 Brod. & B. 67; *Calvert v. Joliffe*, *supra*. The cases pro-

ceed on the analogy to the action on the case, which lies against the sheriff for neglect or wrongful conduct in conducting the sale of goods under a *fi. fa.*, by which they are sold much under their value. *Phillips v. Bacon*, 9 East, 298.

⁶ *Rothery v. Wood*, 8 Camp. 24.

⁷ *Peacock v. Purvis*, 2 Brod. & B. 862.

tels for rent, he was obliged to remove them elsewhere, unless he had the consent of the tenant to impound them on the premises. If he kept them on the premises he rendered himself liable to an action of trespass.¹ But to obviate the inconvenience which might frequently arise by enforcing this rule, the statutes provide that the distress may be impounded in any convenient part of the land chargeable with rent. And this is the practice in Pennsylvania, although the clause of the statute 11, Geo. II., which gives this power, is not contained in the act of the assembly.² At common law beasts might be put in a public pound at the charge of the owner, but if they were kept in a private pound the distrainor was bound to keep them at his peril, with provision at his own cost; and if they died for want of sustenance, the distrainor was liable. Household goods, and other dead chattels which might receive damage from the weather, must be put into a pound *covert*, otherwise the distrainor was answerable if they were damaged or stolen.

§ 606. A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not. If the cattle were wrongfully taken, the person who brought the cattle is answerable, and not the pound-keeper, unless he assented to the trespass. When the cattle are once impounded, he cannot let them go without a replevin or the consent of the party, for they are then in custody of the law; and if the pound is broken the pound-keeper cannot bring an action nor any one else than the person who distrained them.³ At common law, if any person, whether owner or not, of any cattle that had been distrained and put into the common pound, or any other lawful pound, took them out and drove them away, he was liable to an action of *pound breach* at the suit of the landlord;⁴ or if, being in possession of a distress which he was desirous of impounding, another person rescued it before it was actually impounded, an action on the case might be maintained for the disturbance.⁵ The tenant, however, may lawfully rescue his goods before they are impounded, if the landlord seizes them unlawfully, as where there is no rent in arrear; or if, though due, he tenders the rent. So, also, if the landlord takes goods privileged by law, as things protected

¹ 9 Vin. Abr. Distress, E. 4; Winterbourne v. Morgan, 11 East, 896; Wallace v. King, 1 H. Bl. 18.

² Woglam v. Cowperthwaite, 2 Dall. 68.

³ Badkin v. Powell, Cowp. 476; Brandling v. Kent, 1 T. R. 62.

⁴ F. N. B. 100, b.

⁵ F. N. B. 101, a; 102, b.

for the sake of trade, or beasts of the plough, while other things remain on the premises sufficient to satisfy the distress. And a stranger may rescue his goods, if taken without cause.¹

§ 607. After the goods have been seized, the tenant must at once be notified of it, and an opportunity afforded him to redeem them. The statutes generally provide, that whenever any goods or chattels shall be distrained for rent, the officer making the distress shall immediately give notice thereof, with the cause of such distress, the amount of rent due, and an inventory of the articles taken by leaving the same with the tenant, or, in case of his absence at the chief mansion-house, or at some other notorious place on the demised premises. And if a sale is made without giving such notice, the landlord has been held in Pennsylvania to be a trespasser *ab initio*.²

§ 608. A distress when taken cannot be worked or used for any purpose, because the distrainer has only the custody of the thing as a pledge;³ but a cow may, and, indeed, ought to be milked, except where she is put into a pound to which the owner has access, that he may milk her himself.⁴ It is said, however, that if a landlord distrain raw cloth, he may cause it to be fulled; but that hides cannot be tanned, because the tanning will prevent the tenant from recognizing his property.⁵ If an injury happens to the distress in consequence of any act of the landlord, however well intended, he must answer for it to the tenant; therefore, where a horse had several times escaped from the pound, and the landlord, for greater security, tied him to a stake in the pound, and the horse strangled himself with the rope, the landlord had to pay his full value; for the law insists upon the landlord's keeping the distress thus sacred upon the principle that it is a mere pledge in his hands to secure the payment of his rent.⁶

§ 609. Upon the same principle, he was formerly, under the old law, forbid to sell or dispose of the distress, after he had taken it into his possession, for the purpose of reimbursing himself, and was obliged to hold it until the tenant thought proper to redeem it; his security was not, therefore, available to him before the tenant chose to make it so.⁷ But the statute 2 William and Mary, c. 5, first authorized the sale of the property distrained, and made the

¹ 2 R. S. 508, § 23; 2 W. & M. 1, c. 5; Co. Lit. 160, b.

² Kerr v. Sharp, 14 S. & R. 402.

³ Chamberlayn's case, 1 Leon. 220.

⁴ Bagshawe v. Goward, Cro. Jac. 148.

⁵ Duncomb v. Reeve, Cro. El. 788.

⁶ 1 Rol. Abr. 678, l. 26.

⁷ Pledall v. Knap, 1 Anders. 65.

proceeding by distress a speedy remedy for the non-payment of rent. It provided, that if, at the expiration of five days from the day of the service of such notice the amount of the rent due, together with the cost of the distress, shall not be paid, and the goods distrained shall not be replevied according to law, the officer making such distress shall summon two disinterested householders, who shall be sworn by such officer, well, truly, and impartially, to appraise the goods and chattels so distrained, according to the best of their understanding, and the said appraisers shall thereupon appraise the goods and chattels so distrained, and shall state the same in writing under their hands. Of the five days mentioned in the statute, the first of them is to be taken as exclusive, and the last inclusive; thus, for instance, if the seizure be made on Monday, the notice must be given the same day to expire on Saturday.¹ But in Pennsylvania, it is reckoned exclusive of the day of distress; and if Sunday be the last of the five days, it is not to be counted.² The appraisers must be persons having no interest, either as agent or party distraining, and must be sworn before the appraisement is made.³ The officer conducting the proceedings must be present at the appraisement, and is the only person authorized to administer the oath; and the proceedings will be irregular, if the appraisers are sworn before the sheriff of an adjoining county, or the constable of a neighboring town.⁴

§ 610. After the five days' notice to the tenant of the distress, and five days' notice of sale have also expired, if the rent and the charges thereon still remain unpaid, and the goods have not been replevied, the officer proceeds to sell them for the best price he can obtain for them; applying the proceeds of sales to the payment of rent and charges, and the balance, if any, as directed by the statute. The landlord is not bound to sell immediately upon the expiration of the five days, but is allowed a reasonable time afterwards for the appraisement and sale.⁵ If, however, he gives the tenant further time for the payment of rent, and suffers the goods to remain on the premises, it will be prudent to procure the written consent of the tenant to the landlord's keeping possession of the goods upon the premises for the further time thus given. No delay in proceeding to a sale of the property distrained will destroy

¹ *Wallace v. King*, 1 H. Bl. 13.

² *McKinney v. Reader*, 6 Watts, 34.

³ *Lyon v. Weldon*, 2 Bing. 334.

⁴ *Kenney v. May*, 1 Mood. & R. 56.

⁵ *Pitt v. Shew*, 4 B. & A. 208.

the lien for rent, nor vitiate the proceedings, where there is no evidence of collusion between the landlord and tenant.¹ And, as a reasonable time will be allowed for selling, the distrained goods are during such time in custody of the law, and protected from seizure under an execution.¹ If the papers upon which the distress was made should be lost and the sale takes place without them, the purchaser will, nevertheless, acquire a good title, and the authority may be established by secondary evidence.²

§ 611. To prevent the landlord from being deprived of his distress by a clandestine and fraudulent removal of the tenant's goods from the premises, it is generally enacted, that if any tenant or lessee who shall remove his goods from any demised premises, either before or after any rent shall become due, for the purpose of avoiding the payment of such rent; and every person who shall knowingly assist such tenant or lessee in such removal, or in concealing any goods so removed, shall forfeit to the landlord of the demised premises, his heirs or assigns, double the value of the goods so removed or concealed. This section authorizing the landlord to seize any goods which have been removed from the premises, and imposing a penalty on the tenant and others, removing or concealing them for the purpose of defrauding the landlord, applies only to the removal of goods that belong to the tenant, and not to those of a stranger, which may happen to be upon the premises, although they may be liable to a distress.³ The statute, however, contemplates physical aid and assistance, directly or indirectly, in the removal or concealment of the goods, and not mere advisory aid. Nor will the removal or concealment of part of the goods subject the party to the penalty of removing or concealing the whole. And where a tenant is in possession of goods, the law will intend that he is the owner; and the burden of proof to the contrary lies upon him who has removed them to avoid the distress.⁴

§ 612. If a man's servants, or any person in his employ, by his direction, or with his knowledge and assent, assist in the removal of the tenant's goods, it will render the principal liable; or if the goods are removed to his house, and received and concealed by him, he knowing the object and circumstances of the removal, this will bring him within the statute; but the mere advising the re-

¹ Bac. Abr. Execution, C. 4; Harrison v. Barry, 7 Price, 690. cum v. Clark, *ib.* 475; Thornton v. Adams, 5 Maule & S. 38; 11 Geo. II. c. 19.

² Peck v. Gurney, 2 Hill, 606.

³ Coles v. Marquand, 2 Hill, 447; Slo-

⁴ Strong v. Stebbins, 5 Cow. 210.

removal of the goods will not subject him to the penalty of the statute.¹ And although the tenant may sell or mortgage his fixtures, yet if he does mortgage them, and the mortgagee takes possession and removes them, after they have become liable for the rent, the landlord may yet follow and distrain them within thirty days thereafter: but the mortgagee will not, by such removal, subject himself to the penalty imposed by the statute for a fraudulent removal.² In an action for the penalty for assisting a tenant in concealing goods removed from the demised premises, a person who deters a bailiff from taking the property by falsely denying the tenant to be the owner thereof, alleging a third person to be the owner, subjects himself to the penalty.³ But where a creditor took the goods of his debtor, and removed them from the premises by the debtor's assent, in payment of a debt, apprehensive of the landlord's distraining; the court held there was nothing in the transaction in contravention of the statute.⁴ And where the action is for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining, the landlord must prove not only that the defendant assisted the tenant in such fraudulent removal, but was also privy to the fraudulent intent of the tenant; for, as to suits against third persons under this section the statute is penal, and requires strict proof to bring the case within the statute.⁵

§ 613. At common law, if an entry or authority is given to any one *by law* and he abuses it, he is to be considered a trespasser from the beginning; his original entry, and every act done in pursuance of it, is viewed as if the law had given him no authority whatever to enter;⁶ but if he abuses an authority given him *by the party*, he is not to be held as a trespasser *ab initio*. The reason assigned for this distinction is, that where a general authority or license is given by law, the law judges of a man's previous inten-

¹ *Lister v. Brown*, 8 Dowl. & R. 501.

² *Reynolds v. Shuler*, 5 Cow. 323. The Supreme Court of Pennsylvania held, in the case of *Grace v. Shively*, 12 S. & R. 217, that their statute did not apply to cases where the goods were removed before the rent became due. The legislature, on 25 March, 1825, thereupon passed an act confined in its operation to the city and county of Philadelphia, by which the landlord is enabled, even before his rent is due, to distrain for it, when the tenant shall fraudulently carry away from the demised premises, his goods or chattels,

with intent to defraud the lessor of his remedy by distress. And in such case the landlord may consider his rent as apportioned to the time of the carrying away of the goods, and distrain the goods within thirty days, wherever they may be found.

³ *Crafts v. Plumb*, 11 Wend. 148.

⁴ *Bach v. Meats*, 5 Maule & S. 200.

⁵ *Brooke v. Noakes*, 8 B. & C. 537.

⁶ *Six Carpenters' case*, 8 Co. 146; *Van Brunt v. Shenck*, 18 Johns. 414; *Allen v. Crofoot*, 5 Wend. 506.

tions by his subsequent acts ; but where the party himself gives an authority, he cannot, for any subsequent cause, convert that which was originally done under his sanction, into a trespass *ab initio* ; in this latter case, therefore, only the subsequent acts will amount to a trespass. Thus the law gives authority to enter upon land to distrain, but if the distrainer works or kills the distress, or commits any irregularity, the law adjudges that the party entered for the specific purpose of committing the particular injury, and because the act which demonstrates the intention is a trespass, he is adjudged a trespasser *ab initio*. One of the consequences of this doctrine was, that if a landlord committed the least irregularity in distraining for rent, he was considered a *tort feasor* throughout and answerable to the tenant for the value of the goods distrained. And if any of the acts of his agent were without the prerequisites appointed by law, as if cattle were impounded without previous appraisement, or goods taken under a warrant of distress for rent were sold without appraisement and advertisement, — where, as in Pennsylvania, the statute of 11 Geo. II. c. 19 is not in force, — the landlord became a trespasser *ab initio*.¹

§ 614. As this doctrine, however, was found to bear hard upon landlords, it is now provided by statute, that when a distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not, therefore, be deemed unlawful, nor the party making it a trespasser from the beginning ; but the party aggrieved may maintain an action of trespass, or of trespass on the case, and recover satisfaction for the special damages he may have sustained by such irregularity, with costs.² If, therefore, a landlord commences his proceedings right, but should afterwards carry them on wrong, he is only chargeable as a trespasser from the time when the wrong commenced, and not from the original taking of the goods ; and all the injured party can recover is the actual damage he has sustained in consequence of the irregularity.³ The nature of the irregularity, and the peculiar circumstances of the case, must determine whether the proper form of action is trespass or

¹ Sackrider v. McDonald, 10 Johns. 258 ; Purrington v. Loring, 7 Mass. 888 ; Kerr v. Sharp, 14 S. & R. 899 ; Waddell v. Cook, 2 Hill, 47 ; Oxley v. Watts, 1 T. R. 12 ; Aitkenhead v. Blades, 5 Taunt. 198.

² 2 R. S. 505, § 28 ; 11 Geo. II. c. 19. § 19.

³ Winterbourne v. Morgan, 11 East, 895.

case. We shall have occasion to discuss this subject more fully when we come to the action of trespass; but, as a recent illustration of the statute, we will here mention, that where a landlord distrained for rent, amongst other things, some goods which were not legally distrainable, he was held to be a trespasser only as to those particular goods.¹

SECTION II.

THE ACTION OF DEBT FOR RENT.

§ 615. The action of debt is another remedy which the landlord has for the recovery of rent. The action is so called because it is in legal consideration for the recovery of, a debt *eo nomine* and *in numero*; and though damages are in general awarded for the detention of the debt, yet, in most instances, they are merely nominal, and not, as in assumpsit and covenant, the principal object of the suit. By it, every kind of rent is recoverable, whether the contract of demise be by deed or by parol; and whether it is payable in money, corn, or other produce of the land reserved by the lease. In the latter case, the plaintiff recovers, not the produce itself, but its value in money, at the time the rent becomes payable. In addition to the debt, he recovers, also, interest on the rent from the time it was due, as damages for its detention; and if payable in wheat or other produce, he is entitled to interest on the value of such produce, if it was not delivered on the day stipulated.²

§ 616. This action is founded on the privity of contract, said to be annexed to the person in respect to the estate, and follows the estate.³ When the estate is transferred, the remedy is transferred also; if, therefore, the lessor grant his reversion, this remedy follows the reversion to the grantee, and when he assigns it the remedy will pass to the assignee.⁴ The action is not maintainable in any case unless the demand be for a sum certain, or for a pecuniary demand which can readily be reduced to a certainty. In some cases it is the *peculiar* remedy, as against a lessee for an ap-

¹ Harvey v. Pocock, 11 M. & W. 740.

² Demy v. Parnell, 1 Rol. Abr. 591, l.

28; Cheney's case, 3 Leon. 260; 4 *id.* 46; Van Rensselaer's Ex'rs v. Jewett, 5 Den. 135.

³ Ward v. Lumley, 5 Hurlst. & N. 87.

⁴ Howland v. Coffin, 12 Pick. 125; s. c. 9 *id.* 52; Walker's case, 3 Co. 22, b; Humble v. Glover, Cro. El. 328; Patten v. Deshon, 1 Gray, 825.

portionment of rent, upon his eviction from part of the premises by a third person, though covenant may in such cases be sustained against the assignee of the lessee.¹ It is also the only remedy against a devisee of land, for a breach of covenant by the devisor.² It is the appropriate remedy at common law for the lessor, or his assignee, against the assignee of a term of years.³ So where the lessee assigned a moiety of the land for the whole term, the lessor brought debt against the assignee for a moiety of the rent; and it was moved, in arrest of judgment, that the privity of estate and of contract remained entirely with the lessee, and that, therefore, the assignee of a moiety was not chargeable; but the court held that the assignee, having the whole estate in the moiety of the land, has privity of estate sufficient to be charged by the lessor, if he will, with a moiety of the rent, and gave judgment for the plaintiff.⁴ The lessor may also have a joint action of debt against the lessee and assignee for the whole rent.⁵

§ 617. So debt lies for rent upon a lease, though the defendant entered before his title began; for though he is clearly a disseisor by his entry, and the accruing of the term does not alter his estate, yet debt lies upon the privity of contract; and, whether the entry be tortious or not, cannot discharge the contractor from payment of rent.⁶ If a lessee for years assign over his term, reserving rent, he may maintain debt for the rent in arrear, although he has no reversion.⁷ So the landlord, after he has entered for a forfeiture of the lease, may recover the rent which accrued previous to such forfeiture, in this action or upon the covenants in the lease. But for rent which became due subsequent to that time he cannot recover as landlord; and his only remedy is, to proceed for the mesne profits in an action of ejectment against the lessee or the person who has held the possession of the premises adversely to his claim.⁸ As to a lease made by tenants in common, it is settled that the survivor may sue for the whole rent, although the reservation be to the lessors according to their respective interests; for it is a well-known rule, that an action for rent by tenants in common is in its

¹ *Stevenson v. Lambard*, 2 East, 579; *Devereux v. Barlow*, 2 Saund. 182. Rent does not accrue to a lessor as a debt until the lessee has enjoyed the use of the land. *Bordman v. Osborn*, 28 Pick. 295.

² *Doe v. Vernon*, 7 East, 8.

³ *Thursby v. Plant*, 1 Wms. Saund. 241, b; *Allen v. Bryan*, 5 B. & C. 512.

⁴ *Gamon v. Vernon*, 2 Lev. 281.

⁵ *Bailiff of Ipswich v. Martin*, Cro Jac. 411.

⁶ *Alexander v. Dyer*, Cro. El. 169; *Macdonnel v. Welder*, 1 Stra. 550.

⁷ *Newcomb v. Harvey*, Carth. 161; *Demarest v. Willard*, 8 Cow. 206. *Ante*, § 426.

⁸ *Stuyvesant v. Davis*, 9 Paige, 427.

nature a joint action, and consequently the survivor may sue for the whole.¹

§ 618. Debt will also lie for use and occupation generally, without setting forth the particulars of a demise; and where, to a general count for use and occupation, the defendant demurred that it did not set forth any demise of the premises, nor for what term they were demised; what rent was payable, nor for what length of time the defendant held and occupied the premises; nor when the sum thereby supposed to be due became due nor for what space of time; the court still gave judgment for the plaintiff on that count.² The assignee of the reversion, however, in the case of a yearly tenancy by parol, cannot it would seem, bring debt for use and occupation, where such use and occupation was before the assignment to him, but the proper remedy is debt for rent on a parol demise.³ And debt is not maintainable against the lessee after an acceptance of the assignee, but covenant only, as the assignment and acceptance of the assignee destroys the privity; though, if there be no acceptance of the assignee, debt lies notwithstanding the assignment,⁴ and even covenant, after such acceptance of the assignee, only lies against the lessee upon express covenants, and not upon covenants implied in law.⁵

§ 619. This action lay at common law for the rent of lands demised, either for life, for years, or at will,⁶ with the distinction, however, that upon a lease for years, or at will, it lay as soon as rent became in arrear; but, on a freehold lease, debt could not be maintained until after the lease was determined, either by the death of the party for whose life it was granted,⁷ the surrender of the lease, or by the lessor's putting an end to the lease upon a forfeiture, or recovering the lands in an action of waste.⁸ This distinction is said to have arisen from the action of debt lying only upon contract; when the freehold was in existence it could only be the subject of a real action, but, after it was determined, the claim for rent was changed into a contract; and therefore, as soon as the estate was at an end, debt lay for the arrears previously due. It therefore required a special enactment to place freehold leases upon

¹ *Wallace v. McLaren*, 1 Mann. & R. 516.

² *Wilkins v. Wingate*, 6 T. B. 62; *Davies v. Edwards*, 3 Maule & S. 380.

³ *Mortimer v. Freedy*, 3 M. & W. 605, per Parke, B.

⁴ *Shine v. Dillon*, 1 Ir. R. Com. L. 277.

⁵ *Thursby v. Plant*, 1 Saund. 241;

Simpson v. Clayton, 6 Scott, 469; *Wilkins v. Wingate*, *supra*; *Gibson v. Kirk*, 1 Q.B. 850; *McKeon v. Whitney*, 8 Den. 452.

⁶ Co. Lit. 162, a; Lit. Sec. 58, 72.

⁷ Co. Lit. 162, a; Bp. of Winchester v.

Wright, 2 Ld. Ray. 1056.

⁸ *Ognel's case*, 4 Co. 48.

the same footing with leases for years.¹ By the Revised Statutes of New York, any person having any rent due upon any lease for life or lives, may have the same remedy to recover such arrears, by action of debt, as if such lease were for years. The statute is confined to the case of rent *reserved by lease*, and does not extend to the arrears of an annuity, or rent-charge for life, charged upon lands, for which, at common law, no action of debt will lie;² and as the common law as to annuities, or rent-charges out of land of a freehold nature, still prevails, debt will not lie for arrears thereon, so long as the estate of freehold continues. Thus it has been held that it will not lie for the arrears of a rent-charge devised to A., payable out of land devised to B. during the life of B.; and this, though it did not appear in the declaration that the grantor had a freehold in the lands.³

§ 620. The lessee, as well as his executors and administrators, remains liable to an action of debt by the lessor or his assignee, so long as the term continues,⁴ and he cannot discharge himself from such liability by his own act;⁵ if therefore the lessee assigns the lease, he or his executor still remains liable for rent in this action;⁶ but if the lessor accepts rent from the assignee and recognizes him as his tenant, an action of debt will not lie against the original lessee, though covenant may.⁷ If the lessee assigns part of his estate, debt lies against the assignee for the part held by him, and against the lessee for the residue.⁸ But the plaintiff must show that the defendant is assignee of part only, and must not declare against him as assignee of the whole, nor, as it would seem, for the whole rent.⁹ In like manner, if the executor or administrator should assign the lease, he still remains liable to an action of debt;¹⁰ and the landlord may have his choice, whether to sue the lessee or assignee,¹¹ or both jointly;¹² but the assignee is liable to this action only so long as he is possessed of the term, for after he assigns over his interest his liability ceases.¹³

¹ Webb v. Jiggs, 4 Maule & S. 113; Norton v. Vultee, 1 Hall, 884; 1 R. S. 747; 8 Anne, c. 14, § 4.

² Dean of Windsor v. Gover, 2 Wms. Saund. 304; Randall v. Rigby, 4 M. & W. 180; Webb v. Jiggs, *supra*; Kelly v. Clubbe, 8 Brod. & B. 180.

³ Webb v. Jiggs, *supra*; Kelly v. Clubbe, *supra*; Dean of Windsor v. Gover, *supra*; Randall v. Rigby, *supra*. But see Duppa v. Mayo, 1 Wms. Saund. 282, n. 1; Nield v. Smith, 14 Ves. 491.

⁴ Rushden's case, Dyer, 4, b.

⁵ Walker's case, 3 Co. 28.

⁶ Auriol v. Mills, 1 H. Bl. 483; s. c. 4 T. R. 94.

⁷ Rich v. Frank, 1 Bulst. 22; Howse v. Webster, Yelv. 108; Wadham v. Marlowe, 8 East, 814.

⁸ Walker's case, *supra*; Auriol v. Mills, *supra*.

⁹ Curtis v. Spitty, 1 Bing. N. C. 759; Hare v. Cator, Cowp. 766.

¹⁰ Devereux v. Barlow, 2 Saund. 181.

¹¹ Gamon v. Vernon, 2 Lev. 281.

¹² Com. Dig. Det. (E.)

¹³ Tongue v. Pitcher, 8 Lev. 295; Pitcher v. Tovey, 4 Mod. 71.

§ 621. By the common law, the assignee of the reversion or of the rent was only entitled to this action against the lessee after the lessee had attorned, and recognized the change of person to whom rent was due.¹ An attornment, however, became unnecessary after the statute of 11 Geo. II. c. 19, which has been generally adopted on this side the Atlantic. Thus, the New York statute declares, where any lands or tenements shall be occupied by a tenant a conveyance thereof, or of the rents or profits, or any other interest therein by the landlord of such tenant, shall be valid, without any attornment of such tenant to the grantee; but the payment of rent to such grantor by his tenant, before notice of the grant, shall be binding upon such grantee; and the tenant shall not be liable to such grantee for any breach of the condition of the demise, until he shall have had notice of such grant.² And we have seen that the grantees of the reversion are entitled to the same actions which the lessor might have had, if the reversion had remained in the grantor.³ If the lessor assign his rent without the reversion, the assignee may maintain an action of debt for the rent, because the privity of contract is transferred;⁴ but if the lessor grant away his reversion, he cannot have an action of debt for the rent; unless he specially reserves it; because, being incident to the reversion, it passes with it. The grantee of the reversion even cannot have debt against the lessee if he has assigned over; for there was no privity between them but a mere privity of estate, and that being gone by the assignment, this action will not lie.⁵

§ 622. It would seem that, at common law, an action of debt for rent in arrear did not lie against a tenant at sufferance; for the contract was determined, and he was adjudged to be in by wrong; but in such cases there is now a special provision. By statute 4 Geo. II. c. 28, § 1, of which the Revised Statutes of New York, vol. i. p. 745, § 11, is almost a transcript, if any tenant for life or years, or if any other person who may have come into possession of any lands or tenements, under or by collusion with such tenants, shall wilfully hold over after the termination of such term, and after demand made and notice in writing given, requiring the possession thereof by the person entitled thereto, such person so holding over shall pay to the person so kept out of possession, or his representa-

¹ Co. Lit. 809, a.

² 1 R. S. 789, § 146. See also *Farley v. Thompson*, 15 Mass. 26.

³ *Ante*, § 442; 1 R. S. 747, § 23.

⁴ *Allen v. Bryan*, 5 B. & C. 512;

Maule v. Flake, 8 Salk. 118; *Williams v. Hayward*, 1 Ellis & E. 1040; *Robins v. Cox*, 1 Lev. 22; and see *ante*, §§ 440, 447.

⁵ *Humble v. Glover*, Cro. El. 323.

tives, at the rate of double the yearly value of the lands or tenements so detained, for so long time as the same are detained, to be recovered by *action of debt*, against the recovery of which penalty there shall be no relief in equity. This statute has been held to be a penal statute; and, therefore, by strict construction, a tenant for a less period than a year is not within its provisions.¹ Nor will a tenant who holds over under a fair claim of right be considered as holding over wilfully within the meaning of the statute, though it may be decided eventually that he has no right.²

§ 623. The same statutes also declare, that if any tenant shall give notice of his intention to quit the premises holden by him, and shall not accordingly deliver up possession, such tenant, his executors, or administrators, shall thenceforth pay the landlord double the *rent* which he should otherwise have paid, to be levied, sued for, and recovered, at the same time and in the same manner as the single rent; and such double rent shall continue to be paid during all the time such tenant shall continue in possession.³ Under this statute it has been held that a tenant for a year, under a *parol demise*, is included in it; that his notice need not be in writing; and that the landlord may recover the double rent either by an action of debt or by distress;⁴ also that the tenant's notice must fix some particular time when he will quit; for if he gives notice that he will quit as soon as he can possibly get another situation, it will not enable the landlord to recover, although he can prove that the tenant had got another situation.⁵ And the acceptance of single rent, accrued since the notice, is a waiver of double rent, although it does not necessarily imply a consent that the tenancy should continue.⁶

§ 624. It is a general rule, that whenever an action is founded upon a deed, such deed must be declared upon; but the action of debt for rent in arrear forms an exception to this rule, for the plaintiff may here state the substance of the demise only.⁷ So, the

¹ Lloyd v. Rosbee, 2 Camp. 455.

² Wright v. Smith, 5 Esp. 208. One tenant in common may maintain an action on this statute, without his companion, for double the yearly value of his moiety; for where the injury is separate, tenants in common may have several actions. Cutting v. Derby, 2 W. Bl. 1077. And the action may be brought after a recovery in ejectment. Soulsby v. Neving, 9 East, 810. A similar right of action against a tenant at sufferance, is given

in Massachusetts, by statute. Gen. Stat. c. 90, §§ 25, 26.

³ 11 Geo. II. c. 19, § 18; 1 R. S. 745, § 10.

⁴ Timmins v. Rowlinson, 8 Burr. 1808.

⁵ Farrance v. Elkington, 2 Camp. 591.

⁶ Doe v. Batten, Cowp. 243.

⁷ Atty v. Parish, 4 B. & P. 109; Davis v. Shoemaker, 1 Rawle, 185. The statute of limitations is a bar to an action of debt for rent in arrear, where the demise is without deed; but not where the

plaintiff need not set forth any entry or occupation ; for though the defendant neither enters nor occupies, he must pay the rent, it being due by the contract, and not by the occupation.¹ As against an assignee, it is not incumbent on the lessor to set forth the several *mesne* assignments ; it is sufficient to state generally, that all the estate, &c., of the lessee, vested in the defendant by assignment, for it cannot be presumed that the lessor is acquainted with the particulars of the assignee's title.² But if brought by an assignee of the reversion against the lessee, he must set forth the seisin in fee of the first tenant, and the several *mesne* assignments down to himself ; for these are necessary to make out his title, and, being matter of law, must be shown to the court.³

§ 625. The action of debt or covenant by a lessor against the lessee is always *transitory*, and may be brought in any county, even if the land is in another State.⁴ It is so, also (being founded on the privity of contract), when brought, by the heirs or personal representatives of the lessor, against the assignees, grantees, or representatives of the lessee, except on covenants against encumbrances, or relating to the title or possession of the premises.⁵ The same rule applies also to actions for use and occupation.⁶ But where the action is founded on the privity of estate only, and not on the privity of contract, it is *local*, and must be brought in the county where the land lies,⁷ as by the lessor against the assignee of the term : or by the executor of the lessor or by the assignee of the term against the lessor.⁸ So are actions of debt or covenant by the assignee of the reversion against the lessee, or an assignee of the term ; or by the assignee of the term against the assignee of the reversion.⁹ Debt or covenant by the lessor against the executor of the lessee, for arrears of rent accrued in the testator's lifetime only, is transitory ; but if brought in the *debet* and *detinet* for

rent is reserved by specialty. *Davis v. Shoemaker*, *supra* ; *Freeman v. Stacy*, Hutt. 109.

¹ *Bellasis v. Burbriche*, 1 Ld. Ray. 170. In this case it is said, that a tenant at will is liable for rent, only, if he enters. But this is true only of tenancies implied from occupation. Wherever there is an express contract, even by parol, the rent grows due by the contract, and debt lies for it without averment or proof of entry. See *Levi v. Lewis*, 6 C. B. x. s. 766. Per *Willes, J.* *Fuller v. Swett*, 6 Allen, 219 n.

² *Pitt v. Russell*, 8 Lev. 19.

³ *Esp. N. P.* 220.

⁴ *Bracket v. Alvord*, 5 Cow. 18 ; *Bulwer's case*, 7 Co., 2, a ; *Long v. Nethercote*, Cro. Car. 148 ; Co. Lit. 232.

⁵ *Ib.* R. S. 747, §§ 23-25.

⁶ *New York v. Dawson*, 2 Johns. Cas. 885 ; *Low v. Hallett*, 2 Caines, 374 ; *Henwood v. Cheeseman*, 8 S. & R. 502.

⁷ *Bord v. Cudmore*, Cro. Car. 188 ; *Cornel v. Lisset*, 2 Lev. 80 ; 2 R. S. 409, § 2.

⁸ *Thrale v. Cornwall*, 1 Wils. 165 ; *Pine v. Leicester*, Hob. 87 ; *Spencer's case*, 5 Co. 17, a ; *F. N. B.* 146 ; *New York v. Dawson*, *supra* ; *Henwood v. Cheeseman*, *supra*.

⁹ *Spencer's case*, *supra* ; *F. N. B.* 146, c.

rent in the executor's time, it is local; because the executor is then chargeable as assignee on the privity of estate.¹

§ 626. Debt against an executor for rent, incurred during the life of the testator, must be in the *detinet* only.² But for rent incurred after the death of the lessee, the action may be brought either in the *debet* and *detinet* or in the *detinet* only, for the lessor has his election,³ and the only inconvenience of suing in the *detinet* is to the plaintiff himself, who waives his right to demand satisfaction out of the estate of the defendants, and contents himself with what the testator's estate will afford. Debt by or against an executor or administrator, for rent in arrear, partly in the time of the testator or intestate, and partly in the time of the executor or administrator, is well brought in the *detinet* only.⁴ If, in such case, the plaintiff, in the same declaration, charge the defendant in the *detinet* for the rent in the time of the testator or intestate, and in the *debet* or *detinet* for rent in his own time, the declaration will be bad on demurrer, because several judgments would be required.⁵ If, therefore, the lessor will not waive his right of demanding satisfaction out of the estate of the defendant, he must bring two actions. If A. demises land by indenture to B. for years, yielding rent, and B. dies, making C. his executor, the lessor may have debt against the executor for the rent reserved, and in arrear after the death of the lessee, although the executor never entered or agreed; for the executor represents the person of the testator, who, by the indenture, was estopped and concluded, during the term, to pay the rent upon his own contract, and, therefore, although the rent is higher than the profit of the land, yet the executor cannot waive the land, but shall be charged with the rent.⁶ In debt for rent against the lessee or his personal representatives, an assignment before the rent became due cannot be pleaded in bar of the action, for the privity of contract remains, notwithstanding the assignment;⁷ but an assignment and acceptance by the

¹ Walker's case, 8 Co. 24; Hellier v. Casbard, 1 Sid. 266; Cormel v. Lisset, *supra*; Archb. Pl. 88.

² 1 Rol. Abr. 608 (S.) pl. 9.

³ Rich v. Frank, Cro. Jac. 288; Mawle v. Cacyffyr, ib. 549; Royston v. Cordrye, Aleyn, 42. Where no place was alleged in the declaration, and the particulars of demand described the premises as situated in the wrong place; yet, as the defendant held only one parcel of land under the

plaintiff, and could not be misled, the mistake was held immaterial. But if the particulars of the demise are stated, they must be proved as stated. Bristow v. Wright, 2 Doug. 665.

⁴ Smith v. Norfolk, Cro. Car. 225.

⁵ Salter v. Codbold, 8 Lev. 74.

⁶ Howse v. Webster, Yelv. 108; Hellier v. Casbard, *supra*.

⁷ Walker's case, 8 Co. 22, a; Hellier v. Casbard, *supra*.

lessor of the assignee as his tenant may be pleaded in bar, either by the lessee or his personal representatives; because the lessor's acceptance of the assignee as his tenant destroys the privity of contract.¹

§ 627. Where two persons claim the rent, neither of whom has been acknowledged by the tenant as his landlord, he may file a bill of interpleader for the purpose of ascertaining to which of the claimants it is to be paid.² And, although in general a court of equity will not allow a tenant to set up a title against his landlord, the rule does not hold where the question arises upon the act of the landlord, or other commencement of the relation of landlord and tenant.³ The defendant may also show, that he has been evicted, and kept out of the possession of the premises, or some material part thereof, by the landlord, and that the rent is thereby suspended.⁴ But it must appear that an eviction has actually taken place, for a mere trespass or disturbance by a stranger, or even by the lessor himself, will not cause a suspension of the rent;⁵ and, therefore, in a case where the lessor entered upon the premises and destroyed a summer-house upon them, it was held not to work a suspension of the rent.⁶ But when the lessor railed off a part of the premises,⁷ and where, in another case, the landlord gave notice to the under-tenant to quit, which the under-tenant accordingly did,⁸ the act of the lessor, in both cases, amounted to an eviction, and consequent suspension of the rent. This defence may be made at law when the action is brought for rent reserved by the lease; but when the lessee cannot make out his defence at law, as where he has given a bond, or independent covenant, for the amount of the rent, a court of equity will relieve him.⁹

§ 628. The general plea of infancy cannot properly be pleaded to debt for rent on an indenture of lease; and where a defendant pleaded infancy at the time the lease was made, the court upon demurrer held, that as the lease might be for the benefit of the infant, it was voidable only at his election, by waiving the lease before the rent day; but it not being shown that the rent was of

¹ *Marsh v. Brace*, Cro. Jac. 384; *Marrow v. Turpin*, Cro. El. 715.

² *Hodges v. Smith*, 1 Cox, 357.

³ *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 18 *id.* 383; *Belbee v. Belbee*, 6 Madd. 28.

⁴ *Strowd v. Willis*, Cro. El. 362; *Dalston v. Reeve*, 1 *Ld. Ray.* 77; *Burn v. Phelps*, 1 *Stark.* 94.

⁵ *Reynolds v. Buckle*, Hob. 326; *Bushell v. Lechmore*, 1 *Ld. Ray.* 369; *Penn. v. Glover*, Cro. El. 421; *Taylor v. Zamira*, *supra*; *ante*, § 389.

⁶ *Hunt v. Cope*, Cowp. 242.

⁷ *Smith v. Raleigh*, 3 *Camp.* 518.

⁸ *Burn v. Phelps*, *supra*.

⁹ *Poston v. Jones*, 2 *Ired. Eq.* 350.

greater value than the land, and the defendant being of full age before the rent day, the plaintiff had judgment.¹ A plea that no rent is in arrear and unpaid is equivalent to a plea of *nil debet*, since it relates not to the time of the plea pleaded, but to the commencement of the action.² A receipt for rent due at a particular time will be good presumptive evidence that all previous rent has been paid; but this, like every other presumption, may be rebutted, or it may be shown that the receipt itself was obtained collusively or by fraud.³

§ 629. For reasons of public policy, a tenant is never allowed to dispute his landlord's title, after having accepted possession under him.⁴ A lessee by indenture is technically estopped from denying it; and this seems to have been the origin of the rule and the only occasion of its occurrence under the early common law. But it is now of general application whenever possession has been taken under any species of tenancy, whether the action be assumpsit, debt, covenant, or ejectment. As the extent and limits of this doctrine are of like application in each form of action or tenancy, and are fully considered in a later portion of our work, the reader is referred thither for details.⁵

§ 630. It appears to be a rule of the English law, that to an action of debt for rent the tenant cannot set up that he has been "put to expense by the landlord's breach of covenant," and so *set*

¹ *Ketsey's case*, Cro. Jac. 820; *Evelyn v. Chichester*, 8 Burr. 1719; 1 Rol. Abr. 781. In debt on a specialty, there is a material distinction between those cases in which the deed is only inducement to the action, and matter of fact the foundation of it, and those in which the deed itself is the foundation and the fact merely inducement; for, though the plaintiff declare setting forth an indenture of lease, yet, as the fact of the subsequent occupation gives the right to the sum demanded, and is the foundation of the action, and the lease is mere inducement, the defendant may plead *nil debet*. *Duppa v. Mayo*, 1 Wms. Saund. 276, n. 1, 2; *Dean of Windsor v. Gover*, 2 *id.* 297, n. 1; *Bullis v. Giddens*, 8 Johns. 83. This plea puts the plaintiff on proof of his whole declaration, and under it an eviction, payment, or release may be given in evidence. But in debt for rent on an indenture of lease, the defendant cannot, under it, give in evidence that the plaintiff had *no estate* in the tenements; because, if he had pleaded that specially,

the plaintiff might have replied the indenture, and estopped him. *Blake v. Foster*, 8 T. R. 487; *Sullivan v. Stradling*, 2 Wils. 208. It seems that, in Pennsylvania, a defendant may give the statute of limitations in evidence under the plea of *nil debet*. *Davis v. Shoemaker*, 1 Rawle, 185.

² *Warner v. Theobald*, Cowp. 588.

³ *Skaife v. Jackson*, 8 B. & C. 421; *Farrar v. Hutchinson*, 9 Ad. & E. 641.

⁴ *Jackson v. Hinman*, 10 Johns. 292; *Ingraham v. Baldwin*, 9 N. Y. 45; *post*, § 705. A lessee after enjoyment is estopped to deny the title of his landlord. *Bailey v. Kilburn*, 10 Met. 176; *Benedict v. Morse*, *ib.* 228; *Hodges v. Shields*, 18 Ky. 828. Except in cases of fraud or mistake. *Lively v. Ball*, 2 *id.* 58. If the defendant has gained possession by attorning to the plaintiff's title, it is not in his power to destroy his landlord's right by secretly attempting to get another. *Eister v. Paul*, 54 Pa. St. 196.

⁵ See *post*, §§ 705-707.

off one demand against the other, unless there is a covenant in his lease enabling him to do so.¹ And although it was decided, that where the lessor had bound himself to repair, the lessee might plead, to an action of debt for rent, that he had expended the whole amount of rent in repairs after the landlord's refusal to repair;² yet the first position was afterwards fully settled, on the ground that the expenses to which the tenant may have been put, by the landlord's breach of covenant, must be unliquidated damages, and consequently not a proper subject of set-off.³ But this rule, as we have seen, in treating of the covenant to pay rent, has not been adopted in the State of New York, where the doctrine of a recoupment of damages in all such cases now prevails; nor has it been rigidly adhered to in England.⁴ As in a case where the landlord directed the tenant to pay on his account the poor rates assessed upon him, under a promise that the levies should eat out the rent, the court allowed the tenant to set off the rent, as so much *money paid to the landlord's use*.⁵ And where a tenant agreed to lay out a certain sum in repairs, to the approval of the lessor, with a distinct agreement that the tenant might retain a given sum out of the first rent for such repairs; the lessor's approval was held not to be a condition precedent to the retaining of rent by the lessee.⁶ So it is a good plea to say, that the plaintiff levied the whole amount of the rent claimed, or a certain part of it, by distress and sale; but it is no answer that he distrained goods to the value of the rent, if, in fact, he has sold them for a less sum. If he has sold them at too low a price, the tenant's remedy is by action.⁷ Any payment a tenant is compelled to make for his landlord may be made the subject of a plea in this action; and a previous request and promise to indemnify will be implied in favor of a plaintiff who has been compelled to do that to which

¹ Johnson v. Carre, 1 Lev. 152.

² Taylor v. Beal, Cro. El. 222; s. c. A tenant cannot set off against the landlord's demand for rent, a claim for damages which he has sustained from the breach of the latter's agreement to finish or repair the premises. Allen v. Pell, 4 Wend. 505. Or to make an erection upon the premises. Etheridge v. Osborn, 12 Wend. 899. Or to allow common of pasture. Livingston v. Livingston, 4 Johns. Ch. 287. Nor can he set off his claim to have his improvements paid for at the end of the term. Tuttle v. Tompkins, 2 Wend. 407.

³ Clayton v. Kinaston, 1 Ld. Ray. 419; Weigall v. Waters, 6 T. R. 488; Howlet v. Strickland, Cowp. 56. As to the general rule that unliquidated damages cannot be the subject of a set-off, see Livingston v. Livingston, *supra*; Hepburn v. Hoag, 6 Cow. 618; Butts v. Collins, 18 Wend. 189; Hackett v. Connett, 2 Edw. 73; Mead v. Gillett, 19 Wend. 397; Duncan v. Lyon, 8 Johns. Ch. 351.

⁴ See, *ante*, § 874.

⁵ Roper v. Bumford, 3 Taunt. 76.

⁶ Dallman v. King, 4 Bing. N. C. 105.

⁷ Eford v. Burgess, 1 Mood. & R. 28.

the defendant was legally liable. Therefore a compulsory payment by a sub-tenant, to the original lessor, of rent due to him from the mediate landlord, in respect of the premises, is considered as a handing-over, with the landlord's authority, of so much of the rent due to him from the tenant, and in payment of rent *pro tanto*; and, as such, may be pleaded to the landlord's avowry by way of *payment*, as contradistinguished from *set-off*.¹

§ 631. The relation of landlord and tenant creates an implied consent, upon his landlord's part, that the tenant shall appropriate such part of his rent as shall be necessary to indemnify him against prior charges, and that the money so appropriated shall be considered as *paid* on account of rent. But this implication is liable to be rebutted; for if the landlord were afterwards to repay the tenant the money paid by him in respect of the charge, he might recover the entire rent *eo nomine*, without any deduction. In fact, the difference between the two classes of cases lies in the distinction between a *payment* and a *set-off*; the former may be pleaded to an avowry, though the latter cannot. That is a good *payment* which is paid as part of the rent itself, in respect of the land; but a *set-off* supposes a different demand, arising in a different right.² Although a defendant may not technically *set off* unliquidated damages against a demand for rent, so as to have a balance certified in his favor, he may, as we have seen, set up such damages by way of *recoupment*, for the purpose of extinguishing the plaintiff's demand in whole or in part. This he is permitted to do, whether the different parts of the contract are contained in one instrument or in several; whether one part of the contract be in writing and the other by parol;³ or the action be founded on a

¹ Sapsford v. Fletcher, 4 T. R. 511; Taylor v. Zamira, 6 Taunt. 524; Reab v. McAllister, 8 Wend. 109; Westlake v. DeGraw, 25 Wend. 669; Carter v. Carter, 5 Bing. 406. And see *ante*, § 378.

² Sickels v. Forst, 15 Wend. 559; Sapsford v. Fletcher, *supra*, per Buller, J. In a case where the plaintiff declared in the first count for double the yearly value, and in the second for use and occupation, the defendant pleaded, as to the demand in the first count, *nil debet*; and as to the residue, being the amount of the single rent, a tender, and paid the money into court, which the plaintiff took out of court, but proceeded to trial. The defendant moved for a nonsuit, because the plea of tender of rent covered the whole period for which the double value was claimed in

the first count; and the acceptance of the tender, which adopted the terms and character of it, must be taken to be an admission by the landlord, that the defendant held the premises mentioned in the second count as tenant to him, during the whole period for which the rent was claimed; that he received a tender as rent of and for the same premises, and that it consequently operated as a waiver of the penalty. But the court held that the plaintiff was not estopped from taking the money as part of the larger sum claimed; and that his going on with the suit showed that he did not mean to take it in satisfaction of the lesser sum. Ryal v. Rich, 10 East, 48.

³ Batterman v. Pierce, 8 Hill, 171.

sealed or an unsealed instrument. But if the defence, in such case, goes only to some part of the consideration, the defendant cannot plead it specially, but must give notice of it; though it is otherwise when it goes to the whole consideration.¹

§ 632. A mortgage made subsequent to a lease amounts to an immediate grant of the reversion; and the mortgagee is entitled to all the remedies for the recovery of rent, accruing subsequently to an assignment which belong to other assignees of the reversion.² All that has accrued before is a mere chose in action, and consequently not assignable. But as against tenants holding under leases made by the mortgagor subsequent to the mortgage, the mortgagee can neither distrain nor sue for rent in any action, since there is neither privity of contract or estate between the parties.³ But as recent legislation or the local law of many States has very generally taken away from the mortgagee the right either to possession or rent before foreclosure, a surrender of possession and attornment or payment to him is no defence to an action by the mortgagor for the rent.⁴

§ 633. The defendant may also plead a tender of the amount due, in all cases where the duty or sum demanded is certain, or capable of being reduced to a certainty by calculation. It is, therefore, allowed in debt, assumpsit, and covenant, where the breach is the non-payment of money, or the performance of a specific thing; but not in actions on the case, trespass, or trover, or in any other in which the damages are unliquidated.⁵ At common law, a tender could not be made after suit brought.⁶ But this is now otherwise by statute, or local practice, in many States.⁷

¹ Van Epps v. Harrison, 5 Hill, 68; Barber v. Rose, *ib.* 76. Upon an agreement to rent a house and lot, out of the rent of which was to be deducted any repairs that may be done to the same, the erection of a variety of out-houses on the lot was held not to be repairs. Adm'r of Darby v. Farrow, 1 McCord, 517. Evidence of a parol agreement outside of a written lease, to make repairs or improvements on the premises, is inadmissible. Mayer v. Moller, 1 Hilt. 491. Mayor v. Price, 5 Sandf. 542. See further, as to the doctrine of recoupment, *ante*, § 574; Whitbeck v. Skinner, 7 Hill 53.

² Burden v. Thayer, 8 Metc. 79; 4 Kent, Com. 165.

³ Mayo v. Shattuck, 14 Pick. 538; McKircher v. Hawley, 16 Johns. 290. It is a good plea to say that the plaintiff levied the whole amount of the rent claimed, or a certain part of it, by dis-

truss and sale. But it is no answer to an action for rent to say, that the plaintiff distrained goods to the value of the rent, if, in fact, he have sold them for a less sum; for if he has sold them at too low price, the tenant's remedy is by action. Efford v. Burgess, 1 Mood. & R. 28. And the non-payment of rent for a period of twenty, or even twenty-four, years, will not be sufficient to justify a presumption of payment, where circumstances exist tending to excuse the delay in demanding rent; nor, under such circumstances, will a release or conveyance extinguishing the rent be presumed. Cole v. Patterson, 25 Wend. 456.

⁴ See *ante*, § 122 and notes.

⁵ Bac. Abr. tit. Tender.

⁶ Hubbard v. Bank of Chenango, 8 Cow. 88.

⁷ Thus, in New York, the Revised Statutes provide that when any action

§ 634. There is a material distinction between the effect of a tender in money due upon a contract, and a tender of specific articles. In the former case, though a tender be made and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, neither in debt or assumpsit, but in bar of the damages only, that is, of interest and cost; for the debtor must always pay his debt.¹ But the consequence of a tender and refusal, where the articles are cumbrous, and will subject the party tendering to a charge for keeping them, — as cattle, or any other articles requiring warehouse room, which indeed embraces almost every article except money, — is a complete discharge of the contract for delivery, and the party is not bound to hold himself ready, or *keep the tender good*, as in case of money. He holds the articles, however, as bailee, at the risk of the person to whom they have been tendered, subject to be demanded of him, or any other person into whose hand they may come; and, if refused, an action of trover lies for their value.²

SECTION III.

THE ACTION FOR USE AND OCCUPATION.

§ 635. At common law, an action of assumpsit for use and occupation could not be maintained if there was an express demise.

at law shall be commenced for the recovery of a sum certain, or which may be reduced to a certainty by calculation, or for a casual or involuntary trespass or injury, the defendant, in any stage of the proceedings, before trial in such cause, or before the damages shall have been assessed, or before judgment rendered in an action of debt, may tender to the plaintiff or his attorney any sum of money which the defendant shall conceive sufficient amends for the injury done, for which such action or proceeding was instituted; or sufficient to pay the plaintiff's demand, together with the costs of the action to the time of making such tender. And if it shall appear upon the trial of the cause, or assessment of damages, that the amount so tendered was sufficient to pay the plaintiff's demand, and the costs of suit up to the time of tender, the plaintiff shall not be entitled to recover or collect any interest on such demand from the time of such tender, or any costs incurred

subsequent to that time, but shall be liable to the defendant for the costs incurred by him subsequent to such time. 2 R. S. 457, §§ 20, 23. This practice has been essentially modified by the New York Code of Procedure. The plea of tender need not be accompanied with a payment of the money into court; but the effect of it is an admission of the plaintiff's cause of action to that extent, and no further. *Slack v. Brown*, 18 Wend. 394; *Graham's Practice*, 2d edit. 538. So, in Massachusetts, money may be paid into court, and if the sum recovered does not exceed this amount the defendant has costs.

¹ *Wolcott v. Van Santvoord*, 17 Johns. 258; *Jackson v. Law*, 5 Cow. 248; *La Grew v. Cooke*, 1 B. & P. 332.

² Per Kent, J., *Coit v. Houston*, 8 Johns. Ca. 249; *Raymond v. Bearnard*, 12 Johns. 274; *Mehaffy v. Spears*, 1 Hayw. 142; *Lamb v. Lathrop*, 18 Wend. 95. As to what constitutes a good tender, see *ante*, § 398.

Debt for use and occupation always lay,¹ but *assumpsit* was liable to a nonsuit if an express demise was proved.² This restriction was removed by the statute 11 Geo. II. c. 19, where the demise was not by deed and recovery in an action of *case*, i.e. *assumpsit*, was allowed notwithstanding an express demise not under seal was proved.³ The Revised Statutes of New York also enact, — Any landlord may recover in an action on the case, a reasonable satisfaction for the use and occupation of any lands and tenements, by any person under any agreement not made by deed; and if any parol, demise, or other agreement, not being by deed, by which a certain rent is reserved, shall appear in evidence on the trial of any such action, the plaintiff shall not, on that account, be debarred from a recovery, but may make use thereof, as evidence of the amount of the damages to be recovered.⁴ In this action the landlord recovers not *rent*, but an equivalent for the rent, that is to say, a reasonable satisfaction for the use and occupation of the premises, which have been held and enjoyed under the demise; and the rent fixed by the agreement is only used as a medium by which the damages in this form of action shall be ascertained and liquidated. This statute is intended to provide an easy remedy in the simple case of an actual occupation, leaving other more complicated cases to their appropriate and ordinary remedy.⁵

§ 636. Although the law will imply a contract to pay rent, from the mere fact of occupation, yet this action lies only where the relation of landlord and tenant subsists between the parties founded on agreement express or implied.⁶ But in a case where a lease

¹ *Gibson v. Kirk*, 1 Q. B. 850. See *King v. Fraser*, 6 East, 348; *Egler v. Marsden*, 5 Taunt. 25; *Curtis v. Spitty*, 1 Bing. N. C. 17.

² *Churchward v. Ford*, 2 Hurlst. & N. 446. "An action for use and occupation existed before 11 Geo. II. c. 19, but until the passing of that act the plaintiff was liable to be nonsuited if an express demise was proved. Except in that particular, the statute did not make the action maintainable where it could not have been maintained before." Per Bramwell, B. It has sometimes been implied that the statute gave the action; see per Sutherland, J., *Featherstonhaugh v. Bradshaw*, 1 Wend. 185. But it only removed one bar to it.

³ But in *Fuller v. Swett*, 6 Allen, 219 n; *Warren v. Ferdinand*, 9 *id.* 357, the existence of an express demise of any kind

seems to have been regarded as a bar to use and occupation. The statute of Geo. II. appears not to be in force in Massachusetts; yet even at the common law *assumpsit* lay on an express promise. *Dartnal v. Morgan*, Cro. Jac. 598; *Hunt v. Stone*, Cro. El. 118; and debt always lay; see cases *supra*.

⁴ 1 R. S. 739, § 26.

⁵ *Williams v. Sherman*, 7 Wend. 109; *Naish v. Tatlock*, 2 H. Bl. 819. It has sometimes been made a question whether *assumpsit* lies without an express promise. The better opinion seems to be, that it does; *Gunn v. Scovill*, 4 Day, 228; *Rogers v. Tracy*, 1 Root, 233; *Eppes v. Cole*, 4 Hen. & M. 161; and did at common law; *ib.* and see *How v. Norton*, 1 Lev. 179.

⁶ *Smith v. Stewart*, 6 Johns. 46; *Stoddart v. Newman*, 7 Har. & J. 251; *McFarlan v. Watson*, 8 N. Y. 286; *Chambers v.*

was executed for a year, at a quarterly rent, and the defendant who entered under the lessee, at the commencement of the term, and occupied for the whole year, paid the first quarter's rent to the agent of the lessor, and took receipts from him as such agent; it was held that a jury might infer an agreement to pay rent to the lessor, so as to maintain an action in his name for use and occupation during the last quarter of the term.¹ If, however, the position of the parties to each other can be referred to any other ground than that of a distinct tenancy, no promise to pay rent can be implied; this action cannot, therefore, be sustained against a person who came in under the plaintiff as purchaser, although he may continue to hold after the contract of sale has fallen through, for rent accruing previous to the breaking-off of the contract.² And, where the defendant and another person conveyed to the plaintiff an undivided moiety of several houses, of which they were seised as devisees in trust, but of one of the houses the defendant had long before been in possession, and continued to occupy it after the conveyance, it was held that such occupation did not of itself entitle the plaintiff to sue for use and occupation.³

§ 637. For a similar reason, this action will not lie, after a recovery in ejectment, for rent accruing after the day of the demise.⁴ Nor against a tenant who holds over, after the expiration of his term, where proceedings have been instituted against him to turn him out of possession under the statute; for such proceeding is in the nature of an action of ejectment, by which the relation of landlord and tenant is disowned.⁵ The plaintiff's remedy, in such

Ross, 1 Dutch. 298. See *ante*, § 25 and note. Thus where the occupant's entry was tortious, *Ackerman v. Lyman*, 20 Wisc. 454; *Tew v. Jones*, 18 M. & W. 12; *Turner v. Coal Co.*, 5 Exch. 982; or under a third party, *Cripps v. Blank*, 9 D. & R. 480; *Camden v. Batterbury*, 5 C. B. n. s. 808; *Churchward v. Ford*, 2 Hurlst. & N. 449; or where the tenant disowns the landlord's title, *Jackson v. Mowry*, 80 Ga. 143. So where the idea of tenancy is negatived by the conduct of the landlord. *Greton v. Smith*, 88 N. Y. 245. This action cannot be maintained, unless there is an agreement for the use of the premises express or implied between the plaintiff and defendant. *Campbell v. Renwick*, 2 Bradf. 80; *Hall v. Southmayd*, 15 Barb. 32; *Glover v. Wilson*, 2 Barb. 264. It will lie upon an implied permission; *Peckham v. Leary*, 6 Duer, 494; *Pierce v. Pierce*, 25 Barb. 248; *Hillier v. Silcox*, 19

Law Jour. n. s. 295, Q. B., as explained in *Churchward v. Ford*, *supra*; *Clark v. Green*, 85 Ga. 92. If a tenant at will or sufferance renounces the title of his landlord, assumpsit cannot be maintained for the occupation subsequent to the renunciation. *Boston v. Binney*, 11 Pick. 1.

¹ *Bancroft v. Wardwell*, 13 Johns. 489.

² *Osgood v. Dewey*, 18 Johns. 240; *Curtis v. Treat*, 21 Me. 525; *Hall v. Burgess*, 5 B. & C. 332; *Smith v. Stewart*, *supra*, 46. Thus one tenant in common cannot have use and occupation against another. *Hutton v. Powers*, 88 Mo. 853.

³ *Tew v. Jones*, 18 M. & W. 12. Occupancy implies the exclusion of every one else from enjoyment. *Redfield v. Utica & S. R. R.*, 25 Barb. 54.

⁴ *Birch v. Wright*, 1 T. R. 378.

⁵ *Featherstonhaugh v. Bradshaw*, 1 Wend. 184.

case, is either by an action of trespass for the mesne profits, or for double rent under the statute.¹ The mere bringing an ejectment, however, and laying the demise prior to the accruing of the rent claimed, will not bar this action.² Yet, if a party is let into possession under a contract of sale which goes off, he is liable in use and occupation, at the suit of the vendor, for the period during which he continues in possession, after the contract went off; although he may not be for occupation prior to the rescinding of the contract.³ But in no case does it lie, unless the party have the legal estate,⁴ nor where the title is in dispute, for the court will not try the title in this action, the proper remedy in such latter case is by ejectment.⁵

§ 688. This action lies not only for the enjoyment of corporeal, but also of incorporeal hereditaments, even though the letting was by parol.⁶ As for the enjoyment of tolls; a fishery, or watercourse; or by the owner of a market for stallage.⁷ And where the defendant had agreed to take of the plaintiff some veins of iron ore for forty years, at a certain rent, engaging to work the veins in certain proportions, and the plaintiff had agreed to grant such lease; it was held to be, not a mere license, but a right constituting an hereditament, and that use and occupation would lie.⁸ A landlord who has received a note for rent may sue in assumpsit for use and occupation, on delivery of the note at the trial to be cancelled. Or, if he has distrained and sold the goods of the tenant for part of the rent, he may maintain this action for the residue.⁹ So if a lessee holds over after notice from the landlord, that in case he holds over beyond the day specified in the notice, he shall pay an increased rent; the holding-over is an assent to the new rent, and the landlord may recover it in this action.¹⁰

§ 689. Since the statute dispensing with the necessity of an attornment by the tenant, he is liable in this action to the assignee of the reversion, after notice of his title.¹¹ But such assignee can-

¹ *Clarence v. Marshall*, 2 Cr. & M. 496.

² *Cobb v. Carpenter*, 2 Camp. 18 n.

³ *Howard v. Shaw*, 8 M. & W. 118; *Little v. Pearson*, 7 Pick. 801. But in Illinois it lies in this case by statute, Feb. 20, 1861. *Hadley v. Morrison*, 39 Ill. 392.

⁴ *Cobb v. Carpenter*, *supra*.

⁵ *Evertson v. Sawyer*, 2 Wend. 507.

⁶ *Bird v. Higginson*, 2 Ad. & E. 696.

⁷ *Mayor v. Sanders*, 3 B. & Ad. 411;

Davis v. Morgan, 4 B. & C. 8

⁸ *Jones v. Reynolds*, 4 Ad. & E. 805.

⁹ *Cornell v. Lamb*, 20 Johns. 407. A promissory note given and received for rent does not extinguish the claim for rent, which is a debt of a higher degree than that arising upon a note. *Davis v. Gyde*, 2 Ad. & E. 628. And see *Tobey v. Barber*, 5 Johns. 68; *Van Eps v. Dillaye*, 6 Barb. 244; *Davis v. Allen*, 8 N. Y. 168.

¹⁰ *Lofft*, 158.

¹¹ *Birch v. Wright*, 1 T. R. 378; *Lumley v. Hodgson*, 16 East, 99; *Rennie v. Robinson*, 1 Bing. 147.

not recover in this form of action, for an occupation of the premises, which took place before the assignment of the reversion to him;¹ and to an action by the assignee, it is a good defence that the defendant paid the rent to the lessor, before notice of the assignment.² This action may also be maintained by a mortgagee of the reversion;³ or by the grantee of an annuity, to whom the lessor has conveyed the demised premises as security.⁴ But not by a *cestui que trust*, where the letting has been by the trustee;⁵ nor by any person claiming under the *cestui que trust*;⁶ nor by an agent of the lessor.⁷ It lies, although the plaintiff has parted with the whole of his interest to the defendant, if he have reserved a rent, and the defendant has agreed to pay it.⁸ It will not lie, however, by a person merely claiming the estate, against the occupants, who have never held under him, however good the title of such claimant may be.⁹ But an assignee of a lease, who has been recognized as such by the tenant, may sue in his own name for rent, although he may have no interest in the reversion. Thus, where a lessee had assigned the lease without the reversion, and the lessee paid rent to the assignee, the Court of Appeals in New York held, that this created such a privity of contract between the tenant and the assignee, that the latter might sue in his own name for rent subsequently accruing under the lease.¹⁰

§ 640. Where the demise is by deed, the lessor must declare specially on the demise, and cannot recover under the general *indebitatus assumpsit* for use and occupation;¹¹ and the rule is the same whether the action is against the original lessee, or his assignee; although the lessor may recover upon an *insimul computasent*, even if the evidence be of an accounting concerning rent secured by deed.¹² But where a tenant occupied under an agreement for a lease, under seal, he was held to be chargeable in *assumpsit*, for use and occupation, because he did not hold under the deed, but merely under the agreement.¹³ And where a lease by deed had expired, and the tenant held over, the landlord was also

¹ *Mortimer v. Freedy*, 3 M. & W. 602.

² *Birch v. Wright*, *supra*, Dougl. 282.

³ *Rawson v. Elcke*, 7 Ad. & E. 451.

⁴ *Birch v. Wright*, *supra*.

⁵ *Morgell v. Paul*, 2 Mann. & R. 303.

⁶ *Harris v. Booker*, 12 Moore, 283.

⁷ *Evans v. Evans*, 3 Ad. & E. 132.

⁸ *Baker v. Gostling*, 1 Bing. N. C. 19.
Pollock v. Stacy, 9 Q. B. 1033.

⁹ *Cripps v. Blank*, 9 D. & R. 480.

¹⁰ *Moffat v. Smith*, 4 N. Y. 126.

¹¹ *Hunt v. Thompson*, 2 Allen, 341.

¹² *West v. Cartledge*, 5 Hill, 488; *Dungey v. Angove*, 2 Ves. 307; *Codman v. Jenkins*, 14 Mass. 93; *Blume v. McClurken*, 10 Watts, 380.

¹³ *Little v. Martin*, 3 Wend. 219; *Gillott v. Rogers*, 4 Esp. 69.

permitted to recover for the subsequent use and occupation.¹ A defendant had occupied certain premises by virtue of a lease under seal containing a covenant for renewal, which covenant, however, was void for uncertainty; at the expiration of the term, the parties could not agree as to a renewal of the lease, and the tenant held over several years without paying rent; this action was held maintainable to recover the rent due after the expiration of the lease.² But where the defendant entered on the premises under an agreement to purchase in fee, and after occupying them several years, refused to pay the purchase-money on a deed being tendered to him, it was decided that the action did not lie, because the relation of landlord and tenant did not exist between them.³

§ 641. This action will not lie, where the defendant never took possession of the demised premises, either personally or by his agent; and if there has been no occupation for any portion of the term, the only remedy is upon the agreement for damages in not taking possession.⁴ But no continued occupation for any particular length of time need be shown; possession being once taken, the agreement determines the period to which the liability of the party extends.⁵ Nor is an actual or personal occupation by the defendant required to support this action; the constructive possession of an under-tenant or servant being sufficient for this purpose.⁶ But

¹ *Harding v. Crethorn*, 1 Esp. 57; *Longfellow v. Longfellow*, 54 Me. 240. So in an action to recover rent, it appeared that the defendant entered upon the premises under a verbal agreement with the plaintiff, that the parties should enter into a written agreement for years. Rent for the first quarter was paid, but before the second quarter had expired, the plaintiff repudiated the verbal agreement, and threatened to expel the tenant, who thereupon left the premises. The defendant was held not to be liable for any rent, for as the plaintiff had chosen to repudiate the relation of landlord and tenant, he could not hold the defendant responsible for use and occupation, under the rule which at the election of the landlord gives effect to a parol lease, void by the statute of frauds, by implying a tenancy from year to year. *Gretton v. Smith*, 33 N. Y. 245.

² *Abeel v. Radcliff*, 18 Johns. 297; s. c. 15 *id.* 505.

³ *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 18 Johns. 489; *Farley v. Thompson*, 15 Mass. 18; *Little v. Pearson*, 7 Pick. 801.

⁴ *Wood v. Wilcox*, 1 Den. 87; *Jones v.*

Reynolds, 7 C. & P. 335; *Whitehead v. Clifford*, 5 Taunt. 518. The defendant abandoned the premises, and then plaintiff took possession, and relet them to a third person; and it was held that as thereafter the defendant had not actually occupied or legally possessed, the premises, he was not liable for use and occupation. *Beach v. Gray*, 2 Den. 84.

⁵ *Sullivan v. Jones*, 3 C. & P. 579; *Edge v. Strafford*, 1 Cr. & J. 391; *Woolley v. Watling*, 7 C. & P. 610; *How v. Kennet*, 3 Ad. & E. 659. That this form of action lies, although the tenant deserts the premises. See *Westlake v. DeGraw*, 25 Wend. 669. It is unnecessary to show that the defendant was in the actual occupation of the premises during the whole time for which recovery is sought; it is enough if the landlord has put it in the power of the tenant to occupy and enjoy the premises. *Hall v. West. Transp. Co.*, 84 N. Y. 284.

⁶ *Waring v. King*, 8 M. & W. 571; *Bull v. Sibbs*, 8 T. R. 327; *Jones v. Reynolds*, *supra*; *Moffat v. Smith*, 4 N. Y. 128. Where it appeared that a third person was in fact the occupant, proof that the

where a defendant in expectation of a lease by indenture, which he agreed to take from the plaintiff, procured attornments from some of the tenants, and received rents from others, he was held liable to the plaintiff for use and occupation.¹ So where there is an agreement to demise a house for five years, on a lease to be subsequently executed, under which the party enters and afterwards refuses to accept a lease, the owner may maintain this action; for taking the key of a house without a continued occupation is enough for the plaintiff.² But, if the landlord accepts the under-tenant as his tenant, and treats him as such, by distraining upon him for rent, he cannot afterwards sue the original tenant for use and occupation.³ Nor can a husband be sued alone for the use and occupation of premises by his wife, before marriage, as he never was in possession, even constructively.⁴ If there is no express agreement between the parties, and the law raises an implied contract for the payment of what the occupation is really worth, from the fact that the premises belonged to the plaintiff, the obligation is co-extensive with, and measured by, the enjoyment; as soon as the occupation ceases, the implied contract ceases; and as no express time is limited, the remuneration must necessarily accrue from day to day, and is not computed by the quarter.⁵

§ 642. Nor is the rule different upon a general holding-over, where there has been a tenancy at a specified annual rent, or upon an implied understanding;⁶ or even if there was no express agree-

defendant had paid rent to the plaintiff during that occupancy was held to be presumptive evidence that the occupant held under the defendant, and in effect the same as an actual occupancy of the defendant. *Moffat v. Smith*, *supra*. In one case, where the defendant agreed to rent a house, and sent in a woman to clean it, with workmen to paper one of the rooms, there was held to be sufficient evidence of occupation to go to the jury. *Smith v. Twoart*, 2 M. & G. 841.

¹ *Neal v. Swind*, 2 Cr. & J. 877.

² *Little v. Martin*, 8 Wend. 219; *Grant v. Gill*, 2 Whart. 42; *Hemphill v. Flynn*, 2 Pa. St. 144.

³ *Thomas v. Cook*, 2 B. & A. 119; *Hall v. Burgess*, 5 B. & C. 332. To render an under-tenant liable to the original lessor for use and occupation, there must be some privity of contract between them. Such a contract may be implied from the recognition by the former of the latter as his landlord by the payment of rent. *M'Farlan v. Watson*, 8 N. Y. 286; and see *Jennings v. Alexander*, 1 Hilt. 154.

⁴ *Richardson v. Hall*, 1 Brod. & B. 50.

⁵ Per Denman, C. J., in *Gibson v. Kirk*, 1 Q. B. 856. Mr. Justice Beardsley, in a very able opinion, delivered in the case of *Cleves v. Willoughby*, 7 Hill, 88, intimates a doubt whether, under the New York statute, a landlord is not limited in his recovery of rent, to the period of *actual use and occupation*; in opposition to the English cases, which adjudge that the action for use and occupation lies to recover the rent of the whole term, although there has been no actual occupation for the whole time in respect of which the action is brought, considering a mere legal possession as sufficient. The suggestion of the learned judge is based upon the different phraseology of the English and New York statutes; but has left the point open for future adjudication.

⁶ *Stockett v. Watkins*, 2 Gill & J. 326; *Bishop v. Howard*, 2 B. & C. 100; *Bayler v. Bradley*, 5 C. B. 896.

ment as to the amount of rent to be paid ; for an agreement to pay what the premises are fairly worth will be implied, wherever a permissive holding is established.¹ And the tenant is liable if the under-tenant holds over, though against his will ; but he is only liable for the time the premises are held over, and not for the year's rent.² If one of two joint-lessees holds over without the assent of the other, the latter is not liable in this action.³ And where a tenant from year to year, on the expiration of his landlord's title, continues in possession for one quarter, and pays rent for that quarter to the party entitled, but quits at the end of it, the payment is not evidence of a tenancy for more than a quarter.⁴ Where a tenancy is continued beyond the original term, without any new arrangement, the jury may give the landlord a larger sum than the old rent, if there be circumstances to show that an increased rent was expected by him, and that the understanding was not repudiated by the tenant ;⁵ but, in general, the terms of the old tenancy will prevail. Thus an executor of a tenant from year to year, holding over and paying rent, will hold on the terms of the former demise, and be personally liable.⁶

§ 643. This action will also lie against an assignee of the term ; but where a tenant made a general assignment for the benefit of creditors, the lessor was not allowed to sustain this action against his trustees, without proving that they had actually occupied, and that their merely putting persons upon the premises temporarily, to take care of the goods, was not such an occupation.⁷ If the lessee become bankrupt, the lessor may sue the assignees for use and occupation if they actually occupy ;⁸ but not otherwise.⁹ So the executors or administrators of the lessee are liable as such, in this form of action ; but they cannot be sued in their individual capacity, unless they have had an actual and beneficial occupation of the demised premises ;¹⁰ and, in that case, the action will lie only against such of them as have so occupied.¹¹ If partners become tenants, they all continue liable until the determination of the term, although one or more of them may have retired from the

¹ *Hoskins v. Rhodes*, 1 Gill & J. 266 ;
Stockett v. Watkins, *supra*.

² *Ibbs v. Richardson*, 9 Ad. & E. 849,
ante, § 24 and note.

³ *Christy v. Tancred*, 9 M. & W. 438 ;
s. c. 12 *id.* 316.

⁴ *Freeman v. Jury*, Mood. & M. 19 ;
Waring v. King, 8 M. & W. 571.

⁵ *Elgar v. Watson*, 1 Car. & M. 494.

⁶ *Buckworth v. Simpson*, 1 Cr. M. &
R. 884.

⁷ *How v. Kennett*, 3 Ad. & E. 659.

⁸ *Gibson v. Courthorpe*, 1 D. & R. 205 ;
Naish v. Tatlock, 2 H. Bl. 320.

⁹ *Clark v. Webb*, 1 Cr. M. & R. 29.

¹⁰ *Remnant v. Bremridge*, 2 Moore, 94.

¹¹ *Nation v. Tozer*, 1 Cr. M. & R. 172.

partnership before that time.¹ If there be an agreement between the parties, that the tenant will work the farm upon shares, and it is not a lease for which rent is to be paid in produce, the tenant is not liable to any action for rent, the landlord looks to his interest in the crops as his security, and the parties are simply tenants in common of the crops.²

§ 644. As we have before had occasion to observe, if the premises are occupied for an immoral purpose, with the plaintiff's knowledge, the contract is void. Thus in a case where the plaintiff's wife, who managed the business of the house in letting lodgings, had let certain rooms to the defendant, knowing her to be a prostitute, and consented to her receiving visitors there *for the purpose* of prostitution; it was held by the court to be a contract against good morals, and therefore entirely void, and that no action for rent could be maintained on it.³ In another action, however, brought for the use and occupation of certain premises, it was set up as a defence that the defendant was an infant and a prostitute, and had used the premises for the purposes of prostitution; yet the court held that this was no bar to the action, because both an infant and a prostitute must have lodgings.⁴ But upon its being further proved that the lodgings were let to the defendant *for the purposes* of prostitution, and with a knowledge of the facts on the part of the plaintiff, the court decided that no rent could be recovered.⁵

§ 645. Where premises have been rented for a certain term, the landlord may recover the rent accruing after the premises are burnt down, and no longer inhabited by the tenant; for so long as the term continues the landlord cannot enter, even to rebuild, and the tenant must be taken to hold the land.⁶ But where there has been no express demise, the defendant under the general issue may give in evidence that the premises he occupied were burnt down; and this will form a good defence as to so much of the rent as accrued after the fire, but not as to the rent due up to that time.⁷ So where A. made an oral agreement for the purchase of B.'s house,

¹ *Christy v. Tancred*, 7 M. & W. 127.

² *Hare v. Caley*, Cro. El. 148; *Bradish v. Schenck*, 8 Johns. 151; *Bishop v. Doty*, 1 Vt. 87; *Caswell v. Districh*, 15 Wend. 379; and see *ante*, § 24 & n.

³ *Girardy v. Richardson*, 1 Esp. 18.

⁴ *Jennings v. Throgmorton*, Ry. & M. 251.

⁵ *Crisp v. Churchill*, 1 B. & P. 340; *Jennings v. Throgmorton*, *supra*; *Appleton v. Campbell*, 2 C. & P. 347.

⁶ *Baker v. Holtzapffel*, 4 Taunt. 45; *Izon v. Gorton*, 5 Bing. N. C. 501.

⁷ *Packer v. Gibbins*, 1 Q. B. 421.

advanced the purchase-money, and took possession; before A. obtained a deed the house was destroyed by fire, and he thereupon vacated possession of the ground, refused to accept a deed which B. tendered him immediately after the fire, and commenced a suit against B., in which he recovered back the purchase-money; it was held that A., during his occupation of the house, was a tenant at will to B., and liable to him in an action of assumpsit for use and occupation; but that A., by refusing to accept the deed, determined the tenancy at will, and was no longer liable for use and occupation.¹

§ 646. This action lies though the premises, whether before or after the letting, are in an unhealthy or otherwise untenable condition. If by the terms of the lease, the landlord is to do the necessary repairs, and the tenant quits because the premises are in an untenable state, he is still liable for use and occupation, though, by the landlord's default, the tenant has not been, and in fact could not be, during the period for which rent is claimed, in the actual beneficial occupation.² If the inconvenience, whatever it may be, can be readily removed, it should be done, and the damages set up in extinguishment or reduction of the rent, provided the inconvenience is one that comes within the contract of the landlord to remove. But if the tenant enter with knowledge or means of knowledge, of existing circumstances, he can in no case claim such reduction, unless the damage is sustained in consequence of a breach of the landlord's agreement to remove the nuisance.³ And in such case, though it be ruled on the trial that he is not entitled to show that the premises were uninhabitable, but must bring a cross-action to recover his damages, a judgment will not be reversed if it be manifest that, by such decision, he has not been injured.⁴

§ 647. This action will also lie against a tenant who quits the premises without any regular determination of the lease.⁵ And therefore where, in an action for the use and occupation of apartments in the plaintiff's house during half a year, it appeared that the rent was claimed in consequence of the defendant's having neglected to give a notice to quit, and the defence set up was, that

¹ Gould v. Thompson, 4 Metc. 224.

² Cleves v. Willoughby, 7 Hill, 88; Hart v. Windsor, 12 M. & W. 68; Surplice v. Farnsworth, 8 Scott, N. R. 307.

³ Kirkman v. Jervis, 7 Dowl. 678; Collins v. Barrow, 1 Mood. & R. 112.

⁴ Westlake v. DeGraw, 25 Wend. 669.

See ante, § 381, as to when payment of rent is not excused by nuisance.

⁵ Mollett v. Brayne, 2 Camp. 108; Graham v. Whichelo, 1 Cr. & M. 188; Reeve v. Bird, 1 Cr. M. & R. 81.

the plaintiff after the defendant had quit, put up a bill in the window and endeavored to let the premises; Lord Kenyon expressed the opinion, that the defence insisted on would afford no answer to the plaintiff's action; that it was for the benefit of the defendant that the apartments should be let, nor would he infer, from the circumstance of the landlord's endeavoring to let them, that the contract between the parties was put an end to, and said there must be other circumstances to show it, and not merely an act of so equivocal a kind as the one insisted on; and as the plaintiff had proved that the defendant took the premises of him, and had paid rent, it was incumbent on the tenant to prove that the tenancy was regularly put an end to, by express evidence to that effect.¹

§ 648. Where rent is expressly reserved, payable at stated periods the landlord cannot recover a proportionable part of the rent for the occupation of his premises, for any portion of time short of such periods; and, therefore, when a person let out the first and second floors of a certain house for a year, rent payable quarterly, during a current quarter some dispute arose between them, and the tenant, who was a female, told her landlord that she should quit immediately; the landlord answered she might go when she pleased; she did go, and the landlord took possession of the premises; it was held that the landlord could neither recover the rent which, by virtue of the original contract, would have become due at the expiration of the current quarter, — the relation of landlord and tenant having terminated, — nor rent *pro rata* for the time she actually occupied the premises for any period short of the quarter.² So if the landlord accepts another person as his tenant, it amounts to a surrender of the first tenant's term, and he cannot be sued for rent subsequently accruing; accordingly, where a tenant took certain apartments for a year, left them when the year was about half expired, and the landlord let them out to another person by the week, it was held that he could not recover rent against the first lessee for a subsequent portion of the year, during which the apartments had been unoccupied; for although a tenancy from year to year, created by parol, is not determined by a parol license to quit in the middle of the quarter, and the tenant's quitting the premises accordingly (the statute of frauds requiring a deed or

¹ Redpath v. Roberts, 8 Esp. 225; Selw. N. P. 1829.

² Hall v. Burgess, 5 B. & C. 332; Farson v. Goodale, 8 Allen, 202. So Fuller v.

Swett, 6 id. 219 n; Nicholson v. Munigle, ib. 215; where the lease was terminated between rent-days, in accordance with a power therein contained.

note in writing, or a surrender by operation of law), yet the lessor, having precluded the defendant from occupying the apartments, by letting them to another, must be taken to have rescinded the agreement, and to have dispensed with the necessity of a surrender.¹ And if a landlord in the middle of a quarter, accepts from his tenant the key of the house, upon a verbal agreement, that if the tenant then gives up the possession, the rent should cease: he cannot recover any thing for subsequent use and occupation, if the tenant in fact no longer occupies the premises.²

§ 649. If the rent be entire, that is, so much for the whole premises, and the landlord evict the tenant from part of the premises, the tenant cannot be charged for the occupation of the part retained by him;³ but if after an eviction from part, by a title which is paramount to the lessor's, or if he is prevented from obtaining the whole of the premises, by a person holding a part under a prior lease, executed by the landlord; he should still continue to occupy the residue, he is chargeable, not on the agreement, but upon a *quantum meruit*, for the fair value of that portion which he retains.⁴ If a lease be made to one who underlets to a third person, and during the under-tenancy the original landlord gives notice to the under-tenant to quit the premises, and he does quit accordingly, and the land remains unoccupied for a year, and then the first lessee takes possession again; the landlord cannot recover rent against him for the year in which it was unoccupied, for such a case amounts to an eviction by the landlord.⁵ We have seen, also, that if the defendant has been compelled to leave the premises in consequence of a nuisance which it was the landlord's duty to remove, this action cannot be maintained.⁶ And if a landlord of furnished lodgings, by his misconduct, justifies a tenant in an abrupt departure during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation.⁷ But the circumstance of the defendant having left, fearing a distress by the superior landlord, affords no defence to this action;⁸ nor is

¹ Walls v. Atcheson, 8 Bing. 462.

² Whitehead v. Clifford, 5 Taunt. 518.

³ Smith v. Raleigh, 3 Camp. 513; Leishman v. White, 1 Allen, 489; Christopher v. Austin, 11 N. Y. 216; ante, §§ 815, 879; post, § 668.

⁴ Tomlinson v. Day, 2 Brod. & B. 680; Lawrence v. French, 25 Wend. 448; Fitch-

burg Manufacturing Co. v. Melven, 15 Mass. 270; Pope v. Biggs, 9 B. & C. 252; Ludwell v. Newman, 6 T. R. 458.

⁵ Burn v. Phelps, 1 Stark. 94.

⁶ Ante, §§ 880, 381.

⁷ Kirkman v. Jervis, 7 Dowl. 678.

⁸ Rickett v. Tullick, 6 C. & P. 66.

it a defence that the landlord has distrained goods to the full amount of the rent where he has sold them for less ; because if he has sold them at too low a rate, the tenant's remedy is by action.¹

§ 650. In this action the plaintiff may resort to the original agreement, though void under the statute of frauds, for the purpose of ascertaining the amount of rent agreed to be paid.² But if no rent has been agreed upon, or if the agreement has fallen through, the measure of damages will be the true value of the premises, which should be proved.³ And although the plaintiff has not declared upon the agreement, and claims generally to recover for use and occupation, the defendant is not at liberty to give evidence of the value of the premises occupied, to reduce the recovery below the amount stipulated in such agreement.⁴ But where a lessee took a farm under an agreement which he never signed, and the terms of which the lessor himself omitted to fulfil, the court held that the jury were not bound to give a verdict for the amount of rent mentioned in the agreement, and might ascertain the annual value of the premises by other evidence independent of the agreement, and gave their verdict accordingly.⁵ Interest is recoverable on all contracts for the payment of money from the time when the principal ought to have been paid ; and whenever the sum to be paid for the occupation of premises, and the times when the payments are to be made are specified, the plaintiff is entitled to recover interest from those periods.⁶

§ 651. The declaration is generally on the *indebitatus assumpsit* count ; but may be in debt. The venue is always transitory ;⁷ and it has been even held to lie, for the use and occupation of lands in another State.⁸ It must be averred in the declaration that the land was occupied by permission of the plaintiff, or at the request of the defendant.⁹ It need not, however, state the situation of the premises, or give any other local description of them.¹⁰ Nor is it necessary to state the particulars of the demise ; or to describe the premises otherwise than generally, as divers messuages, lands, and

¹ Efford v. Burgess, 1 Mood. & R. 23. An eviction may be proved under the general issue, and need not to be pleaded specially. Prentice v. Elliott, 5 M. & W. 606.

² De Medina v. Polson, Holt, 47.

³ Tomlinson v. Day, 2 Brod. & B. 680.

⁴ Jewell v. Schroepel, 4 Cow. 566 ; Williams v. Sherman, 7 Wend. 109.

⁵ Tomlinson v. Day, *supra*.

⁶ Williams v. Sherman, 7 Wend. 109 ; Dorrell v. Stephens, 4 McCord, 59.

⁷ King v. Fraser, 6 East, 348 ; Kirtland v. Pounsett, 1 Taunt. 570.

⁸ Henwood v. Cheeseman, 8 S. & R. 502 ; Egler v. Marsden, 5 Taunt. 25.

⁹ Bradley v. Davenport, 6 Conn. 1.

¹⁰ King v. Fraser, *supra* ; Kirtland v. Pounsett, *supra*.

tenements, or the like.¹ But the mode of holding under the plaintiff must be described, as whether under himself alone, or as the survivor of another.² In an action against the assignees of B., a bankrupt, the declaration stated that the defendants on such a day were indebted to the plaintiff in a certain sum of money for the use and occupation of two houses, before that time occupied, as well by the bankrupt, whose estate therein the defendants afterwards had, as by the defendants, *at their special instance and request*, for one year then elapsed, and as tenants thereof respectively, to the plaintiff, and by his permission. The bankrupt occupied the premises during part of the year, under an agreement to pay the said sum of money for them, became bankrupt, and his assignees, the defendants, thereupon took possession and continued it for the remainder of the year. The amount due for that part of the year during which the defendants occupied, was paid into court. The court were of opinion that if the plaintiff could recover at all in this form of action, against one person for the use and occupation of another, it could be only on the ground of that occupation having been permitted, *at the defendant's request*, and that request must be proved; that the words "at the special instance and request of the defendants" were in this case words of substance, and operative, connecting the occupation of the defendants, for which they were bound to make a satisfaction, with the occupation of B., a stranger, for whose occupation, *prima facie* at least, the defendants were not liable; that, in point of fact, it was not at the request of the defendants, that B. had been permitted to occupy; the defendants had no relation to B. but as his assignees, and that relation did not commence until the close of his occupation; that relation, therefore, alone could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment, that he had been permitted to occupy "at the request" of the defendants, was, therefore, substance and not mere form, and as the plaintiff had failed in the proof of it, he was not entitled to recover from the defendants the rent due for B.'s occupation.³

§ 652. It was averred in another declaration, in consideration that the defendants, on the 26th of November, 1801, had become and were tenants of a messuage under a certain yearly rent, the

¹ *Wilkins v. Wingate*, 6 T. R. 62.

² *Israel v. Simmons*, 2 Stark. 356.

³ *Naish v. Tatlock*, 2 H. Bl. 319.

defendants promised to pay the same during the continuance of the tenancy ; that the defendants continued tenants from the time of making the promise hitherto ; that the defendants did not, during the continuance of the tenancy, pay the rent ; and that on the 29th September, 1803, half a year's rent was in arrear. The defendants pleaded that they were traders, committed an act of bankruptcy on 2d April, 1803, and that an assignment of their interest in the premises was executed to A. and B. on the 21st May, of the same year, who thereupon entered and occupied the messuage until the rent became due. On demurrer it was held, that the principle determined in *Auriol v. Mills*,¹ that a bankrupt lessee, though out of possession, is still liable upon his *covenant*, to pay rent not due at the time of his bankruptcy, but accruing since, was applicable to every positive agreement to pay rent, whether under seal or not ; that the case referred to did not turn upon any particular effect of a covenant under seal, but on its being the personal agreement of the parties. And although it was objected that if the action was allowed, the consequence would be that there must be an apportionment of rent, yet the court said the landlord had nothing to do in this case with the question of apportionment, for he proceeds against the parties with whom he has made the agreement, and which has been broken.²

§ 653. The defendant may in this action, upon the plea of the general issue, give in evidence any thing which proves nothing due ; as the delivery of corn or any other thing in satisfaction,³ or, in fact, any matter which shows that the plaintiff *never* had cause of action ; or if he had, that matters have subsequently arisen which have avoided or discharged it.⁴ Thus the coverture,⁵ infancy,⁶ or duress of the defendant at the time of entering into the contract,⁷ may be taken advantage of under the plea of the general issue. So a release ;⁸ accord, and satisfaction, payment ;⁹ or a former recovery for the same cause ;¹⁰ and, in general, whatever shows that the plaintiff had no subsisting cause of action at the time when the suit was commenced.¹¹ But a tender,¹² and the

¹ 4 T. R. 94.

² *Boot v. Wilson*, 8 East, 811.

³ *Paramore v. Johnson*, 1 Ld. Ray. 566.

⁴ *Sill v. Rood*, 15 Johns. 280 ; *Gleason v. Clark*, 9 Cow. 57.

⁵ *James v. Fowks*, 12 Mod. 101.

⁶ *Hartness v. Thompson*, 5 Johns. 160 ; *Wailing v. Toll*, 9 *id.* 141.

⁷ *Chitty on Plead.* 470.

⁸ *Brennan v. Egan*, 4 Taunt. 165.

⁹ *Bird v. Caritat*, 2 Johns. 346 ; *Martin v. Thornton*, 4 Esp. 181 ; *Drake v. Drake*, 11 Johns. 581.

¹⁰ *McDaniel v. Hughes*, 8 East, 378.

¹¹ *Sill v. Rood*, 15 Johns. 230.

¹² *Wolcott v. Van Sanford*, 17 Johns. 258.

statute of limitations must be pleaded;¹ and evidence of a set-off cannot be given without notice, or plea.² An eviction before the rent demanded became due is a good defence under the general issue; and a special plea to this effect would be bad on special demurrer, as amounting to the general issue.³ If he has been defrauded by the landlord, or evicted from part, it is a complete defence to the whole rent, and he need not abandon the residue.⁴ So the defendant may plead that he assigned his interest in the demised premises to another, and that the plaintiff accepted such other person as tenant in his stead.⁵ Or that being an under-tenant, and in order to protect his own possession, he paid the rent, or a portion of it, to the superior landlord.⁶ If the landlord has mortgaged his reversion, and the mortgagee have given notice to the tenant to pay the rent to him, this will be a good defence to an action by the landlord for use and occupation, for rent accrued after the notice, if it has been paid to the mortgagee, and it may be so given in evidence under the general issue.⁷ Bringing an ejectment will not be a bar to an action for use and occupation for rent due before the day of the demise laid in the declaration in ejectment; but rent accruing subsequent to that day cannot be recovered in an action for use and occupation.⁸ In this action, where there has been a tenancy at a specified annual rent, and a holding-over, the tenant will be deemed to hold upon the terms under which he entered; but he is not precluded by an agreement to pay a fixed sum for a term less than a year.⁹

§ 654. The tenant is not permitted in this, or any other action, to impeach the lessor's title or right to demise at the time of the lease; nor can he set up an outstanding title against him. Hence a plea of *nil habuit in tenementis* cannot be pleaded, even where the declaration does not state that the premises belonged to the plaintiff.¹⁰ But he may become a purchaser of the reversion or the

¹ Gould v. Johnson, 2 Ld. Ray. 888.

² Drake v. Drake, *supra*; 2 R. S. 855, § 19.

³ Prentice v. Elliott, 5 M. & W. 606.

⁴ *Ante*, §§ 815, 879, 649, and notes.

⁵ Turner v. Hardey, 9 M. & W. 770.

⁶ Sapsford v. Fletcher, 4 T. R. 511; 1 Smith Lead. Ca. 78; Peck v. Ingersoll, 7 N. Y. 528.

⁷ Waddilove v. Barnett, 2 Bing. N. C. 588; Salmon v. Matthews, 8 M. & W. 827. But the doctrine of this case, that a payment on such a mere notice will, if spe-

cially pleaded, be a defence to the tenant against the mortgagor for rent then due and in arrear, is now overruled. See *ante*, § 121, note 5; and such notice without payment or attornment is no defence, even as to rent accruing due thereafter. Whitmore v. Walker, 2 Car. & K. 615.

⁸ Birch v. Wright, 1 T. R. 878; per Buller, J.

⁹ Evertsen v. Sawyer, 2 Wend. 507.

¹⁰ Lewis v. Willis, 1 Wils. 314; Rennie v. Robinson, 1 Bing. 147.

lease, and, of course, the rent would thereby become extinguished. Therefore, where the tenant purchased the reversion of his landlord at a sheriff's sale, on an execution against the landlord, it was held that the interest thus acquired by the tenant extended to the whole of the demised premises, and that he might set it up in bar of a recovery for rent; but where it includes only *part* of the demised premises, it operates only in *diminution of damages*, and the tenant may claim an apportionment of the rent.¹

§ 655. Almost any evidence which shows the relation of landlord and tenant to exist between the parties will support this action. It is not necessary for the plaintiff to prove an express contract with the tenant, when he took possession; or any particular reservation of rent; nor that the tenant has once paid rent; for an understanding to that effect will be implied, in all cases where a permissive holding is established.² Even a parol lease, under which no act has been done by the lessee who has constantly repudiated it, but who has, nevertheless, enjoyed the premises, may be treated by the lessor as a subsisting lease, upon which he may recover rent on a count for use and occupation.³ But where the plaintiff, in support of a general count for use and occupation, offered to prove the acknowledgment of the defendant, that he hired and occupied the premises during the period in question, agreeing to pay therefor a certain sum; and it appeared that there was, during such period, an outstanding written agreement for a lease of the premises in the hands of the plaintiff, which, through failure of the event on the happening of which it was to take effect, never became operative; it was held, in the absence of evidence to show that such acknowledgment referred to the written agreement, that the evidence offered was inadmissible.⁴

SECTION IV.

OF A SUIT IN EQUITY FOR RENT.

§ 656. Another remedy for the collection of rent is by a suit in equity. Before the statutes enlarging the remedies for rent in

¹ *Nellis v. Lathrop*, 22 Wend. 121; *Rennie v. Robinson*, *supra*; *Osgood v. Dewey*, 18 Johns. 240; *Binney v. Chapman*, 5 Pick. 124.

² *Stockett v. Watkins*, 2 Gill & J. 326; *Beverley v. Lincoln*, 6 Ad. & E. 889 (n).

³ *Scott v. Hawaman*, 2 McLean, 180.

⁴ *Buell v. Cook*, 5 Conn. 206; *Gale v. Nixon*, 6 Cow. 446.

arrear, it was often necessary to go into a court of equity, in cases of rent-seck, for suitable redress. These statutes, as we have seen, give the same remedies in cases of rent-seck, as in those of rent service, or a rent charge. There are still, however, many cases where a resort to a court of equity may be proper, and even necessary; as where no remedy at law to meet the exigency of the case exists, or, if it exists at all, is found to be very imperfect, inconvenient, or doubtful. Thus, in a case of a rent-seck, where the grantee never had any seisin, and cannot, consequently, recover at law, a court of equity will decree a seisin, and order the rent to be paid.¹ Or, if the deeds by which a rent is created are lost, so that it is uncertain what kind of rent it was;² or, if there is such a confusion of boundaries, that the lands out of which it issues cannot be exactly ascertained;³ or any perplexity or uncertainty as to the title, or the extent of the defendant's liability.⁴ So, where the days on which the rent is payable are stated to be uncertain;⁵ or, if a lease of an incorporeal thing is assigned, and the assignee enjoys it, he will be decreed in equity to pay rent, though not bound in law; and if an assignee of a term rendering rent assigns over, the lessor may collect rent from the first assignee, so long as he held the land, although he may have no remedy at law for those arrears.⁶

§ 657. Where a *terre-tenant* of lands liable for a rent-charge has suffered the rent to be in arrear, his executor will be compelled in equity to pay the same, although his testator was not personally bound for the rent, which was recoverable only by distress; for his personal estate has been increased by the non-payment.⁷ So a *cestui que trust* of a lease rendering rent will, in equity, be obliged to pay the rent during the time wherein he has taken the profits, if his trustee (the lessee) has become insolvent.⁸ Although a grantee of a rent cannot have a remedy in equity, merely for the want of a distress; yet, if the want of such distress be caused by

¹ Fonbl. on Equity, book i. ch. 8, § 8; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Rathbone v. Warren*, 10 Johns. 587; *King v. Baldwin*, 17 id. 884. These observations will not, of course, be understood as applying to those tribunals which have blended powers of law and equity.

² *Collett v. Jacques*, 1 Ca. in Ch. 120; *Cox v. Foley*, 1 Vern. 859.

³ *Leeds v. New Radnor*, 2 Bro. Ch. 338, 518; *Benson v. Baldwin*, 1 Atk. 598; *North v. Strafford*, 3 P. Wms. 148.

⁴ *Livingston v. Livingston*, 4 Johns. Ch. 287.

⁵ *Holder v. Chambury*, 3 P. Wms. 256.

⁶ Com. Dig. Chancery, 4 N. 1, Rent; *London v. Richmond*, 2 Vern. 423; *Valiant v. Dodemede*, 2 Atk. 546.

⁷ *Eaton College v. Beauchamp*, 1 Ca. in Ch. 121.

⁸ *Clavering v. Westley*, 3 P. Wms. 402.

the fraud, or other default of the tenant, he will be relieved in equity.¹ Or if a rent is settled upon a woman by way of jointure, but she has no power of distress, or other remedy at law, payment of the rent will be decreed in equity according to the intent of the conveyance.² And, if a person is a grantee of an entire rent, issuing out of a manor, and there are no demesne lands on which to distrain, the rent will be decreed in equity.³ Courts of equity have also extended their aid to cases where bills have been filed for discovery and relief, and the discovery is essential to the plaintiff's relief, the defendant admitting the plaintiff's right to the rent; for in such case the relief may be consequent upon the discovery, and the court having obtained jurisdiction for the purpose of the discovery will retain it, in order to carry out the relief.⁴ Another case occurs, where an apportionment of rents among a variety of parties, may be required, in order to obtain complete justice between them.⁵ So where there are several persons claiming the same rent of a tenant, being in privity of contract or of tenure, he may file a bill of interpleader to compel them to ascertain to whom it rightfully belongs. As in the cases of a mortgagor and mortgagee, trustee and *cestui que trust*; or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in the receipt of the rent; or in any similar case, where the tenant does not dispute the landlord's title, but puts himself on the mere uncertainty of the person to whom the rent is payable.⁶ But if a mere stranger sets up a claim to the rent by a title paramount, he is not in privity of contract or of tenure, and the tenant owes him no debt or duty, and is not consequently entitled to a bill of interpleader.⁷

§ 658. Where there are mutual accounts between a landlord and tenant, extending over a number of years, with stipulations in the lease requiring expenditures on one side and allowances on the other, and any of such claims are controverted, a court of equity is often necessary, and always proper, to adjust the rights of the respective parties.⁸ But it does not appear to be necessary that

¹ *Davy v. Davy*, 1 Ca. in Ch. 144.

² *Mitt. Eq. Pl.* 115; *Champernoon v. Gubbs*, 2 Vern. 382.

³ *Leeds v. Powell*, 1 Ves. sr. 171.

⁴ *Story on Eq. Pl.* § 811, &c.; *Livingston v. Livingston*, *supra*.

⁵ *North v. Strafford*, *supra*; *Benson v. Baldwyn*, 1 Atk. 598.

⁶ *Crawshay v. Thornton*, 7 Sim. 391; *Badeau v. Tylee*, 1 Sandf. Ch. 270.

⁷ 2 *Story, Eq. Jur.* § 812; *Dungey v. Angove*, 2 Ves. 304, 310; *Clarke v. Byne*, 13 *id.* 383.

⁸ *Porter v. Spencer*, 2 Johns. Ch. 171; *Hawley v. Cramer*, 4 Cow. 727; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424;

there should be mutual accounts between the parties, in order to give jurisdiction to this court; for it will take cognizance of a case where the accounts are to be examined on one side only, and a discovery is wanted in aid of the account.¹ So where a recovery is had in ejectment, and the plaintiff is afterwards prevented from enforcing his judgment, by an injunction on a bill filed by the tenant, who dies before the bill is finally disposed of; in such case, the remedy at law by an action of trespass for mesne profits is gone by the death of the tenant, since actions of tort do not survive at law; but a court of equity will entertain a bill for an account of mesne profits, in favor of the plaintiff in ejectment, against the personal representatives of the tenant; because it would be inequitable that his estate should receive the benefits and profits of the property of another person.²

§ 659. Mr. Justice Story, in his admirable treatise on Equity Jurisprudence, illustrates the beneficial effect of this jurisdiction in equity, by reference to the case of an under-tenant, who, although he is liable to be distrained for rent during his possession, is not liable to be sued for rent on the covenants of the lease, there being no privity of contract between him and the lessor. But if the lessee becomes insolvent, and unable to pay the rent, the under-tenant will not be permitted to enjoy the possession and profits of the estate without accounting for the rent to the original lessor. And although he has no remedy at law, a court of equity will relieve the lessor, and direct a payment of the rent to him, upon a bill making the original lessee and the under-tenant parties; for if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant. And in equity the rent seems to be a trust, or charge upon the estate; and the lessee is bound, at least in conscience, not to take the profits without a due discharge of the rents out of them.³ But equity will not grant a remedy beyond what, by analogy to the law, ought to be granted. As if a rent be charged on land only, the party who comes into possession of it will not be personally charged with its payment, unless there be some fraud on his part, to remove the

Rex v. Whitstable Fishermen, 7 East, 353; *O'Connor v. Spaight*, 1 Sch. & L. 805.

¹ *Post v. Kimberly*, 9 Johns. 470, 498; *Barker v. Dacie*, 6 Ves. 687; *Frietas v. Dos Santos*, 1 Younge & J. 574.

² Bp. of *Winchester v. Knight*, 1 P. Wms. 407; *Lansdowne v. Lansdowne*, 1 Madd. 116, 188.

³ *Fonbl. Eq. B. 1, c. 5, § 5*; *Goddard v. Keate*, 1 Vern. 87; 1 Story, *Eq. Juris.* § 687.

stock, or he do some other thing to evade the right of distress.¹ Nor will a man be relieved, if he becomes remediless, at common law, by his own negligence; as if he loses his deed, unless it appears that it was once in his custody and he has been deprived of it by some casualty or misfortune; or if he destroys his remedy of distress, and cannot have debt for the arrears, it being due out of a freehold. Neither will it relieve him in cases proper for law, — against his mispleading, or where there is a neglect and want of a plea, or if no proper plea was put in, — for it was his own fault.²

§ 660. Equity will not relieve for *mesne profits*, unless in case of a trust, or an infant, where no entry was made by the person entitled to the mesne profits.³ And, in decreeing an account of mesne profits, where the plaintiff has been prevented from asserting his title by infancy, a trust, or fraud, it will direct such account to be taken from the time the plaintiff's title accrued; until special circumstances require that such account should commence from the time of entry, or of filing the bill.⁴ But it is said that, in taking an account of rents and profits, even in the most favored cases, interest is seldom allowed, especially if the sum be small or uncertain.⁵ The cases decreeing an account of rents and profits, where the legal title is not previously established, proceed upon that respect which, in justice, is due to the interest of persons, who, by fraud, infancy, or otherwise, have been prevented from pursuing their legal rights. But it must not be inferred from the anxiety of courts to protect such rights, that they will at any period, or under any circumstances, exercise such indulgence; for if an infant neglect to enter within six years after he comes of age, he is as much bound, by the statute of limitations, from bringing a bill for an account of mesne profits, as he is from an action of account at common law.⁶ So if there be a verdict at law against an infant's title, a court of equity will not direct an account of mesne profits, but will merely entertain the bill for the purpose of giving the infant an opportunity to establish his title at law.⁷ But if the

¹ Thorndike v. Allington, 1 Ca. in Ch. 79; Palmer v. Whettenhal, *ib.* 184; 1 Fonbl. Eq. B. 1, c. 8, § 8.

² 1 Fonbl. Eq. *supra*; Blackhall v. Combe, 2 P. Wms. 70.

³ Owen v. Aprice, 1 Ch. R. 17; Haiton v. Simpson, 2 Vern. 724; Norton v. Frecker, 1 Atk. 524; 1 Story, Eq. § 689.

⁴ Dormer v. Fortescue, 8 Atk. 130.

⁵ Batten v. Earnly, 2 P. Wms. 163; Drapers' Co. v. Davis, 2 Atk. 211; Tew v. Winterton, 1 Ves. 451.

⁶ Lockey v. Lockey, Prec. Ch. 518; Davey v. Davey, 1 Ca. in Ch. 144.

⁷ Newbergh v. Bickerstaff, 1 Vern. 295.

plaintiff has been kept out of possession by fraud, equity will interfere at any distance of time; since no length of time will bar a fraud, of which the party affected by it was not apprised.¹

SECTION V.

THE ACTION OF COVENANT.

§ 661. The action of covenant is a remedy to recover damages for the breach of a covenant or agreement under seal, whether such covenant is express or implied, or is contained in a deed-poll or indenture.² It is the appropriate remedy, wherever the liability is created by an agreement under seal; but if the law creates the liability independent of the covenant, an action on the case may also be maintained.³ It is the usual remedy on leases at the suit of the lessee, his executor, or assignee, against the lessor, for the breach of a covenant for quiet enjoyment, and the like;⁴ and by the lessor and his assigns against the lessee and his assigns, upon the various covenants usually entered into by him, and which have been treated of in a former part of this work. It is also a concurrent remedy with debt, for the recovery of any money demand, where there is an express or implied contract contained in a deed.⁵

§ 662. Where the demand is for rent, or other liquidated sum, the lessor may proceed either on debt or covenant against the lessee, unless he has accepted the assignee as his tenant; but after an assignment the lessee is only liable in covenant, and then only upon his express covenant, and not upon a covenant in law.⁶ A lessor may even bring covenant, after his re-entry, for non-payment of rent, which accrued previous to the re-entry.⁷ But if there has been an eviction from part of the land by paramount title, the lessee can-

¹ *Cottrell v. Purchase*, Forrest, 68.

² *Gale v. Nixon*, 6 Cow. 445; *Grannis v. Clark*, 8 *id.* 86; *Saltoun v. Houston*, 1 Bing. 433.

³ *Lucky v. Rowzee*, 1 A. K. Marsh. 295.

⁴ *Spencer's case*, 5 Co. 16 b; *Congham v. King*, Cro. Car. 221; *Keeling v. Morrice*, 12 Mod. 371; *Hyde v. Dean of Windsor*, Cro. El. 558.

⁵ *March v. Freeman*, 3 Lev. 383; *By-*

rom v. Johnson, 8 T. R. 410; *Campion v. Crawshaw*, 6 Taunt. 856. Whether covenant will lie on a deed poll or indenture against a lessee who did not execute or seal the lease, but entered, is much controverted. See *ante*, § 259.

⁶ *March v. Freeman*, *supra*; *Thursby v. Plant*, 1 Wms. Saund. 241, n. 5; *Ludford v. Barber*, 1 T. R. 92; *Brett v. Cumberland*, Cro. Jac. 523.

⁷ *Hartshorne v. Watson*, 5 Scott, 506.

not be sued in covenant, but only in debt, for his liability arises on his personal covenant, which cannot be apportioned.¹ At common law, upon the death of a lessor seised in fee, his heir might sue for a subsequent breach of a covenant running with the land, though not named in the lease;² but none could support an action of *covenant*, or take advantage of a condition in the deed, except such as were parties or privies thereto; grantees of the reversion or of a rent were consequently excluded. But, as we have seen, the statutes now give the assignee of a reversion the same remedies against the lessee, his assignee, or personal representative, upon his covenants, as the lessor had at common law; and such assignee is in like manner liable to the same actions for a breach of covenant as the lessor was.³

§ 663. An action of covenant is the peculiar remedy for the breach of a covenant where the damages are *unliquidated*, and depend in amount on the opinion of a jury.⁴ And it is more advisable to proceed in covenant on a lease for general damages, than to declare in debt for a penalty, securing the performance of such covenant; because if the party elects to proceed for the penalty, he is precluded from afterwards suing for general damages, and he cannot, in case of further breaches, recover more than the amount of the penalty; but if he proceeds in covenant for every repeated breach, he may ultimately recover damages beyond the amount of the penalty. So where rent is due upon a lease, and there has been another breach, — as for not repairing, — for which the plaintiff claims unliquidated damages, covenant is preferable to debt, because the former action will embrace both causes of action, and damages for the whole demand may be recovered. Where, however, only a specific sum is sought to be recovered, debt is preferable to covenant; because, in case of judgment by default, the judgment is final in the first instance, unless it be for a penalty, in which case, as we shall see presently, the damages must be assessed under the statute. Where a lease has been assigned by a deed-poll, subject to the covenants, and the assignee break them, the lessor's remedy is *assumpsit*; as the assignee, in such case, does not execute the deed.⁵ And if the breach of covenant amounts to a *tort*, the party has an

¹ *Stevenson v. Lambard*, 2 East, 575.

² *Thursby v. Plant*, 1 Saund. 241 c.

³ *Ante*, § 489, Bac. Abr. Covenant, E.

⁴ *Somerville v. Stevenson*, 8 Stew. 271.

⁵ *Richards v. Killam*, 10 Mass. 248,

247; *Schack v. Anthony*, 1 Maule & S.

578; *Morison v. Kymer*, 8 Camp. 549, n.

a.; *Smith v. Stewart*, 6 Johns. 46.

⁵ *Burnett v. Lynch*, 5 B. & C. 589;

Trustees v. Spencer, 7 Ohio, 498.

election to proceed by action of covenant, or on the case for the tort, as against a lessee, either during his term or afterwards, for waste.¹

§ 664. This action lies only in favor of a person who is party to the covenant; in the name of the covenantee, who holds the legal interest, and not of the person who is only beneficially interested; nor can such third person be joined in the action.² And, therefore, where an attorney authorized by a landlord in writing to execute a lease on his behalf, signed and sealed it in his own name, but the covenants by the lessee were with the landlord by name; it was held that the landlord could not sue upon such covenants.³ Where there are several covenantees, they must join if their interest is joint, although the covenant be several.⁴ But if their interests are several each may sue, although the covenant be joint.⁵ If one of several joint covenantees be dead, the survivor must sue and aver the death in his declaration;⁶ or if one named in the indenture omitted to seal it, this must be averred.⁷

§ 665. Tenants in common of a reversion may maintain covenant against the assignee of the term for rent in arrear, although it should appear that, at the time of suit brought, the reversion was out of the plaintiffs, they having granted it over after the rent became due.⁸ For arrears of rent due, or for breaches of covenant (even on covenants running with the land), prior to the assignment of the reversion, the action must be brought in the name of the assignor, and not of the assignee, as a chose in action cannot be assigned at law;⁹ and the assignor or lessor cannot, after a grant of the reversion, sue for breaches of covenant subsequently committed, or for rent subsequently due, as the right of action is in the assignee.¹⁰ But the assignor may, after assignment, sue for rent due before, as by the assignment it is severed from the inheritance, and does not pass to the assignee;¹¹ and though the assignee

¹ *Kinlyside v. Thornton*, 2 W. Bl. 1111.

² *Wolfe v. Washburn*, 6 Cow. 261; *Jenkins v. Morton*, 3 T. B. Monr. 28; *Strohecker v. Grant*, 16 S. & R. 287; *Southampton v. Brown*, 6 B. & C. 718; *Smith v. Emery*, 7 Halst. 58; *How v. How*, 1 N. H. 49. See *ante*, § 258, and notes.

³ *Berkeley v. Hardy*, 5 B. & C. 355.

⁴ *Montague v. Smith*, 18 Mass. 405; *Ecclestone v. Cliphsham*, 1 Saund. 153; *Anderson v. Martindale*, 1 East, 497; *Petrie v. Bury*, 8 B. & C. 353.

⁵ *Slingsby's case*, 5 Co. 18; *James v.*

Emery, 8 Taunt. 245; *Southcote v. Hoare*, 3 *id.* 87. See *ante*, § 254, and notes.

⁶ *Scott v. Godwin*, 1 B. & P. 67.

⁷ *Vernon v. Jefferys*, 2 Stra. 1146.

⁸ *Midgley v. Lovelace*, 12 Mod. 45.

⁹ *Lewes v. Ridge*, Cro. El. 863; *Kingdon v. Nottle*, 4 Maule & S. 53; *Canahan v. Rush*, 8 Taunt. 227; *Flight v. Bentley*, 7 Sim. 149.

¹⁰ *Kane v. Sanger*, 14 Johns. 89; *Beely v. Parry*, 3 Lev. 164; *Webb v. Russell*, 3 T. R. 394; *Thursby v. Plant*, 1 Saund. 241, d.

¹¹ *Flight v. Bentley*, *supra*.

of the reversion cannot sue for breaches of covenant, which were prior to the assignment, yet he may sue for any continuance of the breach after the assignment, as such continuance furnishes a fresh cause of action.¹ The defendant must have executed the covenant; but, as to a deed-poll, it is not essential that the plaintiff should have signed, as his assent to the contract will be presumed;² although it is otherwise of a deed *inter partes*.³ The lessee has been held liable, although he did not seal, on the ground that his acceptance of the demise was equivalent to an express covenant;⁴ so if a lease be made to A. and B., and A. only execute it, but B. agree thereto, he may be sued jointly with A., upon a covenant running with the land.⁵ But an assignee of the reversion cannot maintain this action on the covenants in the lease if the lessor has not executed it; because, in that case, no reversion vests in the assignee, to which the covenants may attach.⁶

§ 666. We have observed, that covenants which run with the land, will descend to the heir of the covenantee, although he is not named in the lease, who may sue for any fresh breach thereof, if entitled to the reversion;⁷ as on a covenant to repair, though the premises were out of repair during the lifetime of the ancestor, and continued so afterwards.⁸ But if the reversion be of a mere chattel interest, or for breaches in the lifetime of the testator or intestate, the action must be brought by the executor or administrator. And upon all personal or collateral covenants, not running with the land, for breaches both before and after the death of the covenantee, any action after his death must be by the executor or administrator. Thus, where an eviction during the lifetime of the testator was alleged as the breach of a covenant for quiet enjoyment; it was resolved by the court, that the eviction being to the testator during his lifetime, he could not then have an heir or assignee of this land; and, therefore, the damages belonged, not to the heir, but to the executor, though not named in the covenant, for he represented the person of the testator.⁹ This decision has

¹ Mascal's case, 1 Leon. 62.

² Shep. Touch. 162; Cardwell v. Lucas, 2 M. & W. 111; Com. Dig. Covenant, A.

³ *Ante*, § 258.

⁴ Brett v. Cumberland, Cro. Jac. 899, 521; Com. Dig. Covenant, A. 1; Aiken v. Albany, V. & C. R. R. 26 Barb. 289. But the prevailing doctrine is that an action of

covenant does not lie against a lessee by deed poll. See *ante*, § 259 and note.

⁵ Co. Lit. 281, a; 2 Rol. 68.

⁶ Cardwell v. Lucas, *supra*; Cooch v. Goodman, 2 Q. B. 580.

⁷ Lougher v. Williams, 2 Lev. 92.

⁸ Vivian v. Campion, Salk. 141; Doe v. Rogers, 2 Nev. & M. 550.

⁹ Lucy v. Levington, 2 Lev. 28.

been the basis of several decisions in the United States, where, in an action by heirs for a breach of covenants of seisin, it was held that the right of action does not descend to the heirs, but to the personal representative; for that the covenant is not connected with the estate, because, as no estate passed by deed to the ancestor, and none descended to the heirs, the right of the ancestor is a mere right of action for a breach of covenant in his lifetime, which, upon his death, belongs exclusively to the personal representative, and the damages recovered are assets in his hands.¹ A lessor cannot sue for breaches of covenant accruing after he has parted with his reversion, for the right of action has passed to the assignee of the reversion.² So the executor of an executor is entitled to the benefit of a covenant made with the first testator and his assigns, for he is his assignee in law; the word *assignee* comprehending the assignee of an assignee, as well as the assignee of an executor of the assignee.³ But covenant does not lie by an assignee for a breach before his time.⁴

§ 667. The covenants of seisin and against encumbrances, are personal covenants not running with the land, broken immediately on the delivery of the deed, if false; and, therefore, become choses in action, which are not assignable.⁵ If a grantee of land assign by deed of warranty, he may sue on covenants running with the land, although the breach was subsequent to the assignment; but it is otherwise if he assigns by a quitclaim deed.⁶ The rule is, that if the nature of the assignment is such that the assignor is bound to indemnify the assignee against the covenants, he may sue, but not without; for it is founded on the principle, that no man can maintain an action to recover damages who has sustained no damage; and the plaintiff must aver in his declaration that he is answerable to the assignee, on account of the eviction stated.⁷

§ 668. Where there are several covenantors, they must be all joined as defendants where the covenant is joint and not several;

¹ *Hamilton v. Wilson*, 4 Johns. 72; *Bennet v. Irwin*, 3 *id.* 363; *Mitchell v. Warner*, 5 Conn. 497, 504; *Davis v. Lyman*, 8 *id.* 254; *Marston v. Hobbs*, 2 Mass. 489; *Chapman v. Holmes*, 5 Halst. 20; *Birney v. Hann*, 3 A. K. Marsh. 324. See *post*, § 667 and note.

² *Thursby v. Plant*, 1 Saund. 241, d.

³ *Chapman v. Dalton*, Plowd. 284; *Spencer's case*, 5 Co. 17, a.

⁴ *Greenby v. Wilcocks*, 2 Johns. 1; *Lewes v. Ridge*, Cro. El. 868.

⁵ *Mitchell v. Warner*, *supra*; *Hamilton v. Wilson*, *supra*. But this doctrine does not prevail in England and in some of the United States, the covenants being there viewed as continuing. See *ante*, § 263, note.

⁶ *Kane v. Sanger*, 14 Johns. 89; *Williams v. Wetherby*, 1 Aik. 233.

⁷ *Bickford v. Page*, 2 Mass. 455; *Niles v. Sawtell*, 7 *id.* 444.

but, if they covenant jointly and severally, they may either be joined as defendants, or sued separately, at the option of the covenantee.¹ If the action be brought upon a covenant merely implied from a demise, it must be brought against that party only, who in law is deemed to have demised, although others may have joined in the lease by way of confirmation.² On a joint covenant by two, if one die, the survivor only can be sued at law;³ and if both die, the representative of the survivor.⁴ If the covenant is joint, and is broken by the *tort* of one of the covenantors, the other covenantor cannot be charged with this breach, but the covenant shall, for this purpose, be taken as several, and the wrong-doer alone sued.⁵ But a covenantor cannot, by adopting an act which he did not previously direct, make himself liable as for a breach of covenant.⁶ This action will lie against the heir on a covenant by his ancestor for himself and his heirs; but the plaintiff must aver that they were expressly bound by the deed;⁷ and if the heir has no lands by descent, he may plead it in defence of the action.⁸

§ 669. Executors and administrators are bound by the covenants of their testator or intestate, although not named;⁹ unless the covenants are such as in their nature determine by the death of the covenantor, or are to be performed by him personally.¹⁰ And, if in possession, they may be sued as assignees, for they are assignees in law, of the interests of the termor.¹¹ But for a breach committed in the time of the testator, the judgment must be *de bonis testatoris*; for it is the covenant of the testator which binds the executors as representing him; and, therefore, he must be sued in that name.¹² An agent, attorney, executor, administrator, or trustee, who covenants in his own name, although he describes himself as agent, attorney, executor, &c., is personally liable on his covenant; for the addition to his name is merely descriptive, and he can only bind his principal by making the covenant in the name of such principal.¹³ We have before seen to what extent

¹ *Thomas v. Pyke*, 4 Bibb, 418; *Enys v. Donnithorne*, 2 Burr. 1190; *Lilly v. Hodges*, 8 Mod. 166; *Northumberland v. Errington*, 5 T. R. 522.

² *Smith v. Pocklington*, 1 Cr. & J. 445.

³ *Bundy v. Williams*, 1 Root, 548.

⁴ *Ayer v. Wilson*, 2 Rep. Con. Ct. 819.

⁵ *Coleman v. Sherwin*, 1 Salk. 187.

⁶ *Griffiths v. Brome*, 6 T. R. 66.

⁷ *Lawrence v. Buckman*, 8 Bibb, 28.

⁸ *Gifford v. Young*, 1 Lutw. 287; *Dyke v. Sweeting*, Willes, 585.

⁹ *Ex'ors of Van Rensselaer v. Ex'ors of Platner*, 2 Johns. Cas. 17; *Lee v. Cooke*, 1 Wash. 306; *Harrison v. Samson*, 2 *id.* 165.

¹⁰ *Hyde v. Dean of Windsor*, Cro. El. 558; *Townsend v. Morris*, 6 Cow. 123.

¹¹ *Machin v. Molton*, 1 Ld. Ray. 453; *Montague v. Smith*, 13 Mass. 405.

¹² *Collins v. Thoroughgood*, Hob. 188.

¹³ *Duvall v. Craig*, 2 Wheat. 45; *Thayer v. Wendell*, 1 Gallis. 87; *Stone v. Wood*, 7 Cow. 453; *Stinchfield v. Little*, 1 Greenl. 231.

the assignee of the lessee is liable upon covenants, depending in cases where the assignee is not named, on the privity of estate which subsists between the lessor and the lessee and his assigns, in respect to the reversion.¹ But this is a liability which attaches only to the assignee of a legal estate, and not to the devisee of an equity of redemption, which only amounts to an assignment of an equitable interest, not including the whole legal estate.²

§ 670. The rules relating to the venue in the action of debt, heretofore noticed when treating of that action, are applicable to the action of covenant, and need not be repeated here. The declaration must state that the contract was under seal;³ it should also make profert thereof, or show some excuse for the omission.⁴ Only so much of the deed of covenant should be set forth as is essential to the cause of action, and each may be stated according to the legal effect, though it is usual to declare in the words of the deed;⁵ and the breach may negative the condition generally, or according to its legal effect.⁶ Several breaches may be assigned at common law, and damages, being the object of the action, should be laid sufficient to cover the real amount.⁷ For non-payment of rent, it is sufficient to allege that the plaintiff on such a day and year and at such a place, by a certain indenture made between himself of the one part and the defendant of the other (which the defendant brings here into court), demised to the defendant "*certain premises particularly mentioned and described in the said indenture*" (instead of setting out the parcels), except as is therein excepted, to hold the same to the defendant, except, &c., "*for a certain sum therein mentioned and still unexpired,*" yielding the rent, &c., payable, &c., and then state the covenant for payment of the rent, the entry of the defendant, and the breach in not paying so much rent due. Or, if the action be for the breach of any other covenant, the plaintiff need only state "at a certain rent payable by the defendant to the plaintiff, as in the

¹ *Ante*, § 444.

² *Mayor v. Blamire*, 8 East, 487.

³ *Van Santwood v. Sandford*, 12 Johns. 197; *Moore v. Jones*, 2 Ld. Ray. 1586.

⁴ *Cutts v. U. S.*, 1 Gallis. 69; *Read v. Brookman*, 3 T. R. 151.

⁵ *Moore v. White*, 6 Littell, 151; *Macon v. Crump*, 1 Call, 575; *Buster v. Wallace*, 4 Hen. & M. 82.

⁶ *Marston v. Hobbs*, 2 Mass. 433; *Abbott v. Allen*, 14 Johns. 243.

⁷ *Dummer v. Birch*, Comyn, 146;

Bristow v. Wright, Doug. 667; *Harris v. Mantle*, 3 T. R. 807. The true way of declaring upon a deed of demise is to set out that part of the lease only which is necessary to entitle the plaintiff to recover, with such other parts as may qualify those necessary parts, — such for instance, as contain conditions precedent or the like, — and to state no more of the covenants than those on which breaches are assigned.

said indenture is mentioned," and then set forth those covenants and the breach of them.¹

§ 671. We have seen, that a covenantor may require a bond as additional security for the performance of covenants. Between covenants in general, and covenants secured by a penalty or forfeiture, there is this difference: in the latter case the obligee has his election, to bring an action of debt for the penalty (after which he cannot resort to the covenant, because the penalty is a satisfaction for the whole);² or if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less of the penalty *toties quoties*.³ The practice of taking a bond for performance of covenants has some advantages; for, on a breach of covenant the bond becomes absolute, and the penalty an immediate *debt*, and, consequently, confers on the obligee, through the medium of the statute, the power of attaching the lands in the hands of a devisee, for satisfaction in damages for the covenant broken. Where a lessor takes a bond of this description, he will generally find it more advantageous to sue on the covenants contained in the lease for general damages, than to proceed on the bond for the penalty; because, by adopting the latter course, he is precluded from afterwards suing on his covenant; and as he can never recover on the bond an amount exceeding the penalty, he may be ultimately left on future breaches, without the means of redress; whereas, he may proceed on his covenant for breaches *toties quoties*; and may recover damages far exceeding the amount of the penalty.⁴

§ 672. The inconveniences attending bonds of this nature, and the hardship of enforcing payment of the whole penalty, however disproportioned to the actual damage sustained by the obligee, was

¹ *Thursby v. Plant*, 1 Wms. Saund. 233, a. Implied covenants may be declared on, as if they were expressed in the lease, for such is the effect of the lease. *Grannis v. Clark*, 8 Cow. 36. Where the plaintiff declares upon a demise by himself, he is not obliged to set out any title to the lands demised, but may begin his declaration with stating that "whereas by a certain indenture, &c., he demised," &c. But in an action by an assignee of the reversion, he must set out the title of the lessor to the premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff. And, although the entry of the lessor

into the demised premises is usually averred, yet such averment is unnecessary, for he is liable in debt or covenant for rent, by virtue of the contract, if he has not entered; and so is the assignee of the lessee. Neither is such averment necessary in an action of covenant by the assignee of the reversion, to whom the privity of contract is transferred by the statute. *Bellasis v. Burbriche*, 1 Ld. Ray. 170; *Walker v. Reeves*, Doug. 461, n. 1.

² *Bird v. Randall*, 3 Burr. 1345.

³ *Lowe v. Peers*, 4 Burr. 2228.

⁴ *Platt on Covenants*, 548; *Adams v. Essex*, 1 Bibb, 149.

at one time seriously felt; although a court of equity might afford relief by preventing the collection of more than was sufficient to make full compensation for the damage; and gave rise to the stat. of 8 & 9 Will. III. c. 11, from which the Revised Statutes of New York have been derived. It enacts that, "When an action is brought for a penal sum, for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought. Upon the trial of such action, if the jury find that any such assignment of breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them. Judgment is to be entered for the penalty in the usual form of an action of debt, and execution issue for the damages so found. The judgment is directed to stand as security for any damages that may thereafter be sustained by the non-performance of any other covenant or written agreement, the performance of which was secured by such penal sum. Whenever further breaches occur, a *scire facias* issues upon such judgment, suggesting such breaches against the defendant and all parties bound thereby, and commanding that they be summoned to show cause why execution should not be had upon such judgment, for the amount of damages sustained by such further arrears."¹

§ 678. Still, however, the question may arise, whether the sum fixed is to be considered in the nature of a penalty or as liquidated damages. If a penalty, and the lessor proceeds, upon breach of the covenant to collect it at law, equity will interfere, direct an issue to ascertain the amount of damages, and compel the lessor to take only so much as will compensate him for the breach of the covenant. As if the tenant covenant, under a certain penalty, not to plough certain lands, the lessor will not be allowed to recover more than the actual damages he may sustain if the tenant does plough.² Yet if the act to be done is single, as to pay a certain additional sum for every acre converted into tillage, such sum may be recovered as liquidated damages.³ But an agreement to perform certain work by a limited time, under a certain penalty, is

¹ 2 R. R. 378, §§ 6-15.

² *Lowe v. Peers*, *supra*; *Sloman v. Walter*, 1 Bro. Ch. 418; *Barrett v. Blgrave*, 5 Ves. 555.

³ *Farrant v. Olmius*, 8 B. & A. 692; *Denton v. Richmond*, 1 Cr. & M. 784.

not to be taken as liquidated damages which the party is to pay for the breach of his covenant, but is in the nature of a penalty.¹ And the court will look into extrinsic circumstances, for the purpose of determining whether the sum mentioned is intended for a penalty or as liquidated damages.² The statute is calculated to protect covenantors against the payment of further sums than are in conscience due, and also to take away the necessity of proceeding in equity to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued.³ It is highly remedial in favor of defendants, and the plaintiff cannot refuse to proceed according to its provisions.⁴ Before the statute, the plaintiff could assign only one breach on the bond; for, by assigning several breaches, the declaration was objectionable on the ground of duplicity, because the bond was forfeited by the breach of one covenant as well as of several.⁵

§ 674. In assigning the breach of a covenant, it may be done according to the substance, though not in the letter of the covenant.⁶ It is in general sufficient, where the covenant is in the affirmative, to negative its performance in the words of such covenant. But the rule will not apply where this mode of pleading does not necessarily amount to a breach; for, on a covenant to indemnify the plaintiff, the breach must show how he was damaged. So on a covenant for quiet enjoyment, the declaration must show how, and by whom, the plaintiff was disturbed in his possession.⁷ And when a covenant is in the alternative, to do one or other of two things, the breach must show that the party has done neither. But in assigning the breach of a covenant for quiet enjoyment, the plaintiff need not set out the title of the person who entered upon him, because he is supposed to be a stranger to it; it is sufficient to allege generally, that he had a lawful title before or at the time, of the conveyance to the plaintiff.⁸ An assignment of a breach of covenant, although in the words of the covenant, has been held ill upon a demurrer to the defendant's plea, because

¹ *Tayloe v. Sandiford*, 7 Wheat. 13.

² *Perkins v. Lyman*, 11 Mass. 76; s. c. 9 *id.* 522.

³ *Hardy v. Bern*, 5 T. R. 686; *Mackworth v. Thomas*, 5 Ves. 331.

⁴ *Dragg v. Brand*, 2 Wils. 377; *Roles v. Rosewell*, 5 T. R. 588; *Walcott v. Goulding*, 8 *id.* 126.

⁵ *Symms v. Smith*, Cro. Car. 176; *Barnard v. Michel*, 1 Vent. 114, 126.

⁶ *Potter v. Bacon*, 2 Wend. 583.

⁷ *Brown v. Stebbins*, 4 Hill, 154; *Harris v. Mantle*, 3 T. R. 807; *Randel v. Ches. & Del. Canal Co.*, 1 Harringt. 151; *Rickert v. Snyder*, 9 Wend. 416; *Marston v. Hobbs*, 2 Mass. 433.

⁸ *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. E. I. Co.*, 8 *id.* 278.

it did not show any particular act of the plaintiff, or in what respect he had refused to act, which amounted to a breach of his covenant. And such bad assignment was not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff sued, who was an administratrix) to a declaration in covenant for unliquidated damages.¹ But, in general, the breach may be assigned according to the substance and legal import, though not according to the letter, of the covenant.²

§ 675. Where the covenant is in the negative, the declaration in assigning the breach must state specifically what the defendant has done in breach of his covenant. Great certainty, however, is not in general required in stating this, as the acts or omissions alleged are within the defendant's own knowledge.³ Certainty to a common intent will be sufficient; as where a man covenants for himself and his assigns to pay rent, it is sufficient to say that he did not pay it, without negating a payment by his assigns.⁴ But where the breach states the act of a third party as the cause of the infringement complained of, it must be stated with certainty. If, for instance, in an action upon a covenant for quiet enjoyment, the breach state an eviction, and leave it uncertain whether the evicting party claimed adversely to the covenantor, it will be bad; it should state that such party had a lawful title before and at the time of the grant to the plaintiff, otherwise, if the breach be general and unqualified, it will be presumed that the title of the evicting party was derived from the plaintiff himself.⁵ Rent is recoverable by way of liquidated damages, upon a covenant by the lessee to pay a certain additional rent for every acre converted to tillage; and the receipt of the original rent, without demanding the additional sum, will not be a waiver of it.⁶

§ 676. There is strictly no plea of the general issue in this action for *non est factum* only puts in issue the fact of sealing the deed, so *non infregit conventionem* and *nil debet* are insufficient pleas; and, therefore, most matters of defence must be specially pleaded.⁷ Where the breach is assigned generally, by merely

¹ Warn v. Bickford, 7 Price, 550.

² Potter v. Bacon, 2 Wend. 588; Abbott v. Allen, 14 Johns. 248; Marston v. Hobbs, *supra*; Salman v. Bradshaw, Cro. Jac. 304.

³ Gale v. Reed, 8 East, 85.

⁴ Bull. N. P. 164; Archer v. Marsh, 6 Ad. & E. 969.

⁵ Brookes v. Humphreys, 5 Bing. N. C. 55.

⁶ Denton v. Richmond, 3 Tyrw. 630; Jones v. Green, 3 Younge & J. 298; Farant v. Olmius, 3 B. & A. 692.

⁷ Barney v. Keith, 6 Wend. 555; Mar. Ins. Co. v. Hodgson, 6 Cranch, 206; Legg v. Robinson, 7 Wend. 194; Com. Dig. Pleader, 2 V. 4; Hodgson v. E. I. Co. 8 T. R. 288.

negating the words of the covenant, a plea of performance, pursuing in the like general manner the words of the covenant, is good.¹ But where the particular facts which constitute the breach are stated, a plea of performance should meet those facts, and answer them specifically.²

§ 677. To an action of covenant for rent, as in debt, the lessee may plead that he was evicted by the lessor from the demised premises, and kept out of possession until after the rent in question became due; for an eviction occasions a suspension of the rent;³ but a mere trespass will not. For where, to covenant for the rent of a dwelling-house, the defendant pleaded that the lessor had taken away a fruit-house fixed to the dwelling-house, and part of the demised premises; on demurrer the court held, that the fact stated in the defendant's plea being a mere trespass, for which he might have a remedy by action, would not operate as a suspension of the rent.⁴ Although rent is suspended by an entry into part of the premises, yet on a demise of a *messuage* with the appurtenances the covenant to *repair* is not suspended by an entry into the back-yard, the lessee remaining in possession of the *messuage*.⁵

§ 678. If a tenant would excuse himself from payment of rent, upon an eviction by a stranger, he must show that the stranger had a good title to evict him; and, in order to give the plaintiff an opportunity of controverting such title, the defendant must show how it arises; for if it were sufficient to allege generally that the stranger had a good title, a single issue could not be taken on it; and as the legality, as well as the fact of title, would be complicated together, the jury would be entangled with questions of law, which are proper for the consideration of the court alone; to avoid this inconvenience, it is necessary that the title should be specified.⁶

¹ *Abbott v. Allen*, 14 Johns. 248.

² *Bradley v. Osterhoudt*, 18 Johns. 404; *Postmaster-Gen. v. Cochran*, 2 *id.* 416. In Pennsylvania, under a plea of performance, with leave to give in evidence any thing that amounts to a legal defence, the defendant may prove any matter that he might have pleaded specially. *Webster v. Warren*, 2 Wash. C. C. 456; *Bender v. Fromberger*, 4 Dall. 439. On such a plea, the defendant has a right to open and close. *Norris v. Ins. Co. of N. A.*, 3 Yeates, 84. It admits the execution of the instrument, and assumes the proof of performance. *Harrison v. Park*, 1 J. J. Marsh. 172; *Roth v. Miller*, 15 S. & R. 105; *Bar-*

rett v. Crutcher, 3 Bibb, 202. But in Alabama, a plea of payment, or of performance, does not admit the deed, and the plaintiff must prove his cause of action as if no such plea had been filed. *Bryant v. Simpson*, 8 Stew. 339.

³ *Fitchburg Man. Co. v. Melvin*, 15 Mass. 258; *Dalston v. Reeve*, 1 *Ld. Ray.* 77; *Dyett v. Pendleton*, 8 *Cow.* 727. See *ante*, § 310 note.

⁴ *Roper v. Lloyd*, T. Jones, 148, *ante*, §§ 388, 389.

⁵ *Snelling v. Stagg*, Bull. N. P. 165.

⁶ Per *Ld. Hardwicke*, in *Jordan v. Twells*, Ca. Temp. Hardw. 172.

A landlord cannot maintain an action of covenant, for arrears of rent, against a party occupying demised premises, charging him as assignee, when in fact he never had an assignment of the lease; though he will be presumed to be in as assignee if in possession, until the contrary appears.¹ Nor does the action lie for breach of a covenant for quiet enjoyment, although the grantee has been prosecuted in trespass by a third person, claiming title and a recovery had against him, unless the plaintiff in the action avers and proves that such third person, before or at the date of the covenant, had lawful title, and, by virtue thereof, entered and ousted the plaintiff.² It is not necessary to state all the facts constituting an eviction, but a declaration setting forth such facts would be good.³

§ 679. Rent is only apportionable where the partial eviction is by a stranger; ⁴ for upon such an eviction by the lessor, he cannot maintain either debt or covenant for rent in any amount. And even, upon a partial eviction by the lessor, if the lessee, instead of giving up the remainder of the premises, as he may do, continues to hold them, he cannot be charged for their value upon a *quantum meruit*, any more than upon the covenant in the lease.⁵ A partial eviction by the lessor, however, is only a bar to an action on the covenant for rent, and forms no answer to a breach of other covenants in the lease; at least until it be shown that the party elected to give up the residue of the premises.⁶ Against the assignee of a term, though an eviction of three-eighths of the estate has taken place, the defendant is not entitled to ask for an apportionment of rent, under a general plea denying his holding as assignee. Such relief can only be had by pleading the facts specially, and not in bar of the whole action.⁷ If the defendant be charged with a breach of covenant for non-payment of rent, and he have surrendered his estate after some part of the rent became due, he cannot plead his surrender in bar of the whole action, for the breach is not entire, but the plaintiff may recover by proving part of it.⁸

§ 680. An assignee, who is chargeable only in respect of his privity of estate, may show that, before the rent became due, or

¹ Quackenboss v. Clarke, 12 Wend. 555.

² Webb v. Alexander, 7 Wend. 281.

³ Rickert v. Snyder, 9 Wend. 416; McGeehan v. McLaughlin, 1 Hall, 88.

⁴ Neale v. Mackenzie, 1 M. & W. 758.

⁵ Newton v. Allin, 1 Q. B. 518; Digby

v. Atkinson, 4 Camp. 275; Tomlinson v. Day, 2 Brod. & B. 680. *Ante*, §§ 315, 317, 649, 658, and notes.

⁶ Browne on Actions, 354.

⁷ Lansing v. Van Alstyne, 2 Wend. 561.

⁸ Barnard v. Duthy, 5 Taunt. 27.

before the breach of covenant, he assigned the estate, and so discharged himself.¹ And where, to a plea of this kind, the plaintiff replied, that in and by the indenture the lessee for himself, his executors, administrators, and assigns, covenanted not to assign without the consent of the lessor, and that no such consent was given; the replication was holden bad, because the action was founded on the privity of estate, which was destroyed by the assignment; the proper remedy for the plaintiff was, by action on the covenant not to assign.² The lessee is always liable upon his covenant, notwithstanding his assignment; but if sued *in debt*, he may show that he has assigned with the assent of the landlord, either expressly, or implied by his recognition of the assignee as his tenant.³ But he cannot plead to covenant for rent, an assignment and tender by the unaccepted assignee.⁴

§ 681. In debt, where the plaintiff seeks to recover the rent itself, it is sufficient to show payment after the day on which it became due, or that the lessor distrained upon him, and so satisfied his demand; ⁵ but these defences are not available in covenant, because here, the plaintiff seeks damages for the defendant's breach of covenant, and the plea would, in itself, amount to an admission that he had broken it.⁶ In any form of action, however, an under-tenant may show, that before the rent became due, the superior lord or the grantee of a rent-charge, threatened to distrain for rent due from the lessee, and that he paid the rent to save his own goods.⁷ It must appear to have been a compulsory, and not a mere voluntary, payment; but it will not be the less a compulsory payment, that the landlord, on demanding it, allows the occupant time to pay.⁸ Covenants may sometimes also be discharged by parol upon a good consideration.⁹ So an action for a breach of covenant may be barred by a note accepted in satisfaction of the breach.¹⁰ But a negotiable note with sureties taken by a landlord after making a distress, for the amount claimed as rent payable in sixty days, under an agreement to relinquish the distress, and not re-enter or distrain within the sixty days, is only a

¹ Pitcher v. Tovey, 1 Show. 840.

² Paul v. Nurse, 8 B. & C. 486.

³ Marrow v. Turpin, Cro. El. 715.

⁴ Orgill v. Kempshead, 4 Taunt. 642.

⁵ Dyer, 20, b; Cecil v. Harris, Cro. El. 140.

⁶ Hare v. Savill, 1 Brownl. 19; Warner v. Theobald, Cowp. 688.

⁷ Sapsford v. Fletcher, 4 T. R. 511;

Cobb v. Carpenter, 2 Camp. 18, n.; Taylor v. Zamira, 6 Taunt. 524.

⁸ Carter v. Carter, 5 Bing. 406; Pope v. Biggs, 9 B. & C. 245.

⁹ Barnard v. Darling, 11 Wend. 28; Marks v. Robinson, 1 Bailey, 89.

¹⁰ Moody v. Leavitt, 2 N. H. 171.

collateral security, and not a payment or satisfaction of the rent, inasmuch as the note did not appear to be taken in *absolute payment*; it appearing, also, that the note had not been paid or negotiated by the landlord, and that, therefore, all his remedies were open independent of the note.¹

§ 682. In an action for rent by the lessor, the defendant cannot *set off* damages that he may be entitled to recover against the lessor, on covenants contained in the same indenture on which the action is brought;² but we have seen in what cases, and to what extent, a tenant may *recoup* himself for payments made by him on the lessor's account, or for damages he may have sustained by the lessor's failure to perform his covenants.³ The statute of limitations does not apply to actions on specialties. And an action for a breach of covenant for title will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy.⁴ Where the assignee of a term of years covenants to perform all the covenants in the lease, on the part of the lessee to be performed; in an action of covenant by the lessor or assignor against him, for rent due and unpaid to the original lessor, it is not necessary to allege that the plaintiff has been obliged to pay the rent to the lessor, or been damnified; for such an assignee will continue liable, although he may have assigned over the lease, before any rent became due, to one who has been accepted by the lessor as his tenant; and *non damnificatus* is, therefore, no answer to the declaration, for the covenant, being express and positive, is broken by the rent remaining unpaid.⁵ A recovery in an action on a covenant against encumbrances, and assessment of nominal damages merely because the covenantee had not removed the encumbrance, is no bar to another action to recover the actual damage suffered to extinguish the encumbrance.⁶

§ 683. Where covenants are dependent, it is a good plea in bar that the party seeking performance has not performed or offered to perform the covenants on his part;⁷ although it is otherwise where the covenants are independent.⁸ In covenant against a lessee for

¹ *Cornell v. Lamb*, 20 Johns. 407; *Warren v. Forney*, 18 S. & R. 52.

² *Tuttle v. Tompkins*, 2 Wend. 407.

³ *Ante*, §§ 374, 380.

⁴ *Hammond v. Toulmin*, 7 T. R. 612; *Mills v. Auriol*, 1 H. Bl. 433; *ante*, § 457. An insolvent's discharge is no bar to an action on an express covenant to pay rent brought to recover rent accruing subse-

quent to the discharge. *Lansing v. Prendergast*, 9 Johns. 127; *Auriol v. Mills*, 4 T. R. 94; *Stinemets v. Ainslie*, 4 Den. 578; and see, *ante*, §§ 456, 457.

⁵ *Port v. Jackson*, 17 Johns. 239, 479.

⁶ *Donnell v. Thompson*, 1 Fairf. 170.

⁷ *Parker v. Parmele*, 20 Johns. 130.

⁸ *McC Campbell v. Miller*, 1 Bibb, 453; *Webster v. Warren*, 2 Wash. C. C. 456.

not repairing, the declaration stated, that by indenture the defendant covenanted to repair the demised premises, and, at the end of the term, to surrender up the same in good repair, the lessor (the plaintiff) finding timber sufficient for such repairs; the breach assigned was for not repairing; the defendant pleaded that the plaintiff did not find sufficient timber; on demurrer, it was adjudged, that finding the timber was a thing in its nature necessary to be done first, and, therefore, a condition precedent, the performance of which ought to have been averred in the declaration.¹ To an action for not repairing the premises, the tenant may show, that the lessor was bound to furnish him with timber or other materials for the repairs, and that he has neglected or refused to do so. But a plea that the landlord did not assign him materials is bad, for he should have shown that he asked; or that there were none proper to which he had a right, is also bad, for this puts the issue upon a point of law, and not a matter of fact.²

§ 684. The execution of a lease, and the possession of the premises by the defendant, is evidence sufficient *prima facie* to charge him as assignee for the non-payment of rent; although it is not conclusive.³ But if the issue is made up on the question whether the defendant holds as assignee, the plaintiff must prove the assignment to the defendant.⁴ Where the breach is specially assigned, and the proof alleged to be by deeds and records, they are to be shown on oyer.⁵ On a plea of performance, the defendant assumes the burden of proof, and is, therefore, entitled to open and close the case.⁶ Upon a breach assigned that the defendant had not used the premises in a husband-like manner, but, on the contrary, had committed *waste*, an issue was taken that the defendant had not committed waste. At the trial, the plaintiff offered evidence to show, that the defendant had not used the premises in a husband-like manner, which did not, however, amount to waste; but the judge rejected the evidence, being of opinion, that on this issue it was not competent for the plaintiff to prove any thing which fell short of waste, and the opinion was afterwards confirmed by the court.⁷

§ 685. A court of equity will not, in general, decree the specific

¹ Thomas v. Cadwallader, Willes, 496.

² Brailsford v. Parsons, 1 Lutw. 808.

³ Williams v. Woodard, 2 Wend. 487;
Lansing v. Van Alstyne, *ib.* 568.

⁴ Lansing v. Van Alstyne, *supra*;
Quackenboss v. Clarke, 12 *id.* 555.

⁵ Wilford v. Rose, 2 Root, 172.

⁶ Scott v. Hull, 8 Conn. 296.

⁷ Harris v. Mantle, 3 T. R. 307.

performance of a covenant, but leaves the party to his damages in an action at law.¹ But under some circumstances, as where a tenant is about to do an act against which he has expressly covenanted, this court will restrain him by injunction.² It is only, however, where the legal remedy is inadequate and defective that equity interferes. Where a defect is discovered in the title, which can be supplied by the grantor, the grantee may file a bill in equity for a specific performance of the covenant for further assurance. And a grantor under this covenant will be compelled to convey a title he may have subsequently acquired, though he purchased such title for a valuable consideration.³ Although equity cannot specifically enforce a covenant to rebuild, unless its terms are clearly defined, yet, when the agreement is so distinct that the court can describe the building, as a subject for the report of a master, specific performance will be decreed.⁴ If a covenant is broken, the landlord may indulge his caprice, and even malice, against the tenant, without any certain relief; but, as a general rule, equity will not enforce a covenant embracing a hard bargain; and, at law, there can be no damages without an injury.⁵ But there are many cases of covenant broken, in which the recovery of damages at law, however large in amount, would never be a compensation to the party aggrieved. Hence has arisen the system of preventive justice administered in a court of equity, by means of injunction to restrain breaches of covenant. This opens a wide field of learning, which we do not intend to enter upon, having already touched upon it in treating of the respective covenants of the parties, to which the reader is referred. A very frequent cause of its application, however, occurs in the prevention of waste, which subject we have next to discuss.

SECTION VI.

ACTIONS FOR WASTE.

§ 686. At common law, an action of *waste* may be maintained by the reversioner, to recover damages for voluntary waste com-

¹ *Flint v. Brandon*, 8 Ves. 159; *Eagle F. I. Co. v. Cammet*, 2 Edw. 128; *Dean of Ely v. Stewart*, 2 Atk. 44; *Lucas v. Comerford*, 1 Ves. 285; *Errington v. Aynsley*, 2 Bro. Ch. 841; *Hill v. Barclay*, 16 Ves. 405.

² *Barret v. Blagrave*, 5 Ves. 555.

³ *Taylor v. Debar*, 1 Ca. in Ch. 274; 2 *id.* 212; *Seabourne v. Powell*, 2 Vern. 11.

⁴ *Mosely v. Virgin*, 3 Ves. 184.

⁵ *Doe v. Phillips*, 9 Moore, 46; *Doe v. Watt*, 8 B. & C. 308.

mitted by the tenant during his occupation.¹ It could only be brought by him who was entitled to the immediate reversion of the premises, at the time when the waste was committed. And for the want of this privity of estate, the assignee of the reversion could not sue for waste done previous to the assignment.² The reversioner must have had an estate of freehold in him; for, as waste is an injury to the inheritance, a tenant for years could not maintain an action for waste.³ And it was punishable only against three classes of persons, guardian in chivalry, tenant in dower, and tenant by the curtesy; but not against a tenant for life or years: for the reason, as Lord Coke says, that the law which created the former of these estates and interests provided a remedy itself against waste, but left the owners of the land, who created the others, to provide a remedy in their demise.⁴ The statute of Gloucester⁵ extended the protection of the writ of waste to tenants for life and for years; and directed that the tenant should forfeit the place wasted, and also treble damages. The Revised Statutes of New York have so far altered the common law, as to permit every person seised of an estate in remainder or reversion, to maintain an action of trespass or waste, for any injury done to the inheritance, notwithstanding any intervening estate for life or years.⁶ And this he may do, although after the commission of the waste, he has alienated the estate, and has no interest therein at the time of suit brought.⁷ It also provides, that if any guardian, or any tenant by the curtesy, tenant in dower, or for term of life or years, or the assigns of any such tenant, shall *commit* waste, during their several estates or terms, of the houses, gardens, orchards, lands, or woods, or of any other thing belonging to the tenements so held, without a special and lawful license in writing so to do, they shall be subject to an action of waste.

¹ *Greene v. Cole*, 2 Wms. Saund. 252, n. (7); *Jefferson v. Bp. of Durham*, 1 B. & P. 120. The nature of waste is discussed under the head of the covenant to repair, *ante*, §§ 345-356.

² Co. Lit. 58, a; *Greene v. Cole*, 2 Wms. Saund. 235, n. (2); *Carris v. Ingalls*, 12 Wend. 70; *McLaughlin v. Long*, 5 Har. & J. 118; *Robinson v. Wheeler*, 25 N. Y. 252.

³ *McLaughlin v. Long*, *supra*.

⁴ Co. Lit. 145; 2 Bl. Com. 282.

⁵ 6 Edw. I. c. 5.

⁶ 1 R. S. 750, § 8. The action of waste, as provided for and regulated by the New York statute, has been abolished by the

Code of Procedure, and a civil action substituted. "Wrongs heretofore remediable by action of waste are subjects of action as other wrongs; in which action there may be judgment for damages, forfeiture of the estate of the offending person, and eviction from the premises." Code, § 450. The provisions of the revised statute relating to the action of waste shall apply to an action for waste, brought under the code, without regard to the form of action so far as the same can be applied. § 451.

⁷ *Robinson v. Wheeler*, *supra*. It is enough if he was seised of the interest at the time the waste was committed.

§ 687. To guard against fraudulent transfers, these statutes further provide, that in case any such tenant shall let or grant his estate, and still retain possession of the same, and commit waste, the party entitled to the reversion of the tenements may maintain his action of waste against such tenant. If one joint tenant, or tenant in common, shall commit waste of the estate held in joint tenancy, or in common, he shall be subject to an action of waste, at the suit of his co-tenant or tenants. And an heir, whether he be within or of full age, may maintain an action for waste done in the time of his ancestor, as well as his own time.¹ The statute then proceeds to point out the different proceedings in the action of waste; and if the action is brought by any other than a joint-tenant, or tenant in common, and the plaintiff prevails in the action, the judgment is that he recover the place wasted, and treble the damages found by the jury. If the action is brought by a tenant in common, or by a joint tenant against his co-tenant, and he recover; he will be entitled, at his election, either to take judgment for the treble damages found by the jury, or to have partition made of the premises held in common or joint tenancy. If he adopts the latter course, commissioners are to be appointed, who proceed to make a final and effectual partition between the parties.²

§ 688. The common-law action of waste, however, has fallen into disuse, and given way to an action *on the case*, in the nature of waste, which is now the ordinary means of recovering damages against a tenant for *voluntary* waste.³ And in this form of action the reversioner, or remainder-man in fee, for life or for years, may recover damages, either against his tenant or a stranger, for an injury to his reversion;⁴ and although the lease may contain a covenant against waste, he is not obliged to sue upon the covenant,

¹ 2 R. S. 884, §§ 1-4.

² 2 R. S. 885, §§ 10-17.

³ *Queen's College, Oxford, v. Hallett*, 14 East, 489. In an action to recover damages for waste, the jury, in determining the amount of damages, are to inquire how far the acts of the defendant have injured the plaintiff's estate and inheritance. And, in doing so, they are not limited to the value or market price of wood and timber actually cut and removed; but should also consider the effect which the cutting of it has had upon the place alleged to be wasted. *Harder v. Harder*, 26 Barb. 409.

⁴ *Greene v. Cole*, 2 Saund. 252, d, note; *Elwes v. Mawe*, 8 East, 88. The provisions of the N. Y. R. S. 750, § 8, giving the reversioner or remainder-man an action of waste or trespass, notwithstanding any intervening estate for life or years, authorizes only waste against a tenant, and trespass against a stranger: it does not give waste against a stranger. *Livingston v. Haywood*, 11 Johns. 429; *Bates v. Shrader*, 13 *id.* 260. An action on the case in the nature for waste lies against an assignee of the lease. *Short v. Wilson*, *ib.* 88.

but may elect to bring either covenant or case. The action lies against a tenant by sufferance, or for years, although holding over after notice to quit.¹ But against a tenant at will, trespass, and not case, is the proper remedy.² Though assumpsit is the usual remedy against a tenant, for not cultivating land according to the course of good husbandry, or for not repairing, yet for voluntary waste, and particularly where there has been any conversion of trees, or other property, case may frequently be preferable; which, it has been held, is a concurrent remedy with covenant, where there has been voluntary waste. And if a tenant does any act which is injurious to the reversion, the landlord may bring his action for damages during the term, even although the tenant may have it in his power to restore the premises to their original state before its expiration.³

§ 689. A tenant for years, or from year to year, was formerly held liable for *permissive waste*; ⁴ but the later cases hold that he is in neither case liable for mere permissive waste, unless the lease contains a covenant to repair on his part.⁵ The common-law action cannot be maintained against an executor, for waste committed by a testator in his lifetime; because waste is a tort, and the cause of action strictly personal, which, in the language of the law, dies with the person. But the Revised Statutes of New York provide a remedy in such cases; for any person, or his personal representatives, may have actions of trespass against the executor or administrator of any testator or intestate, who, in his lifetime, shall have wasted, destroyed, or carried away the chattels of any such person, or committed any trespass on the real estate of any such person.⁶ The executors and administrators of a tenant for years, however, are punishable for waste committed by themselves, while in possession of the land, as other persons are. And if, by the commission of waste by a testator, his personal estate has been benefited, his executors will be chargeable for it at common law, to the value of the property, in an action for money had and received.⁷ Every lessee, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land, by whomsoever com-

¹ *Kinlysie v. Thornton*, 2 W. Bl. 1111.

² *West v. Treude*, Cro. Car. 187; *Salop v. Crompton*, Cro. El. 777; Co. Lit. 57, a; *Goodright v. Vivian*, 8 East, 190; *Attersoll v. Stevens*, 1 Taunt. 194.

³ *Queen's Coll. v. Hallett*, 14 East, 489.

⁴ *Thursby v. Plant*, 1 Wms. Saund. 238, b, n. 7.

⁵ *Gibson v. Wells*, 4 B. & P. 290; *Wise v. Metcalfe*, 10 B. & C. 312.

⁶ 2 R. S. 114, § 5.

⁷ *Hambly v. Trott*, Cowp. 376.

mitted; and if done by a stranger he must answer, and take his remedy over.¹ And if one of two joint tenants commit waste, it is waste by them both; but when treble damages are imposed by any statute, they are only recoverable against the person who actually committed the waste.²

§ 690. The Revised Statutes also enact, that after the actual commencement of any action for the recovery of land, or the possession of land, the defendant in such action shall not make any waste of the land in demand, pending the suit; and if he does commit waste, the court in which such action is pending shall have power to make an order restraining him from the commission of any further waste thereon; and the court making such order shall have the same power to attach and commit the defendant for any violation thereof, that is possessed by the Court of Chancery, upon the violation of an injunction issued out of that court;³ the effect of which is, to give the common-law courts the same power to *restrain and prevent waste*, in cases of this kind, which has formerly been exercised by the Court of Chancery alone. The common-law remedies, however, are still so inadequate, as well to prevent waste, as to give redress for waste already committed, that they have in a great measure, given way to the remedy by bill in equity; which is so much more easy, expeditious, and complete, that it is almost invariably resorted to. By such a bill not only may future waste be prevented, but an account may be decreed, and compensation given for past waste. Besides, as we have seen, an action on the case will not lie at law for permissive waste; but in equity an injunction will be granted to restrain permissive as well as voluntary waste.⁴ This course of proceeding is also open to many persons who could not take advantage of the legal remedies; and an injunction will be granted, though no action at law can be maintained against the tenant; nor is it necessary, in any case, that there should be a suit pending.⁵

§ 691. A landlord need not wait until waste is actually commit-

¹ *Cook v. Champl. Transp. Co.*, 1 Den. 91; *Attersoll v. Stevens*, 1 Taunt. 196.

² *Greene v. Cole*, 2 Saund. 259, b.

³ 2 R. S. 333, §§ 18, 20.

⁴ *Caldwall v. Baylis*, 2 Mer. 408; 2 Story, Eq. Jur. 179; *Anon.* 1 Ves. 98. In *Watson v. Hunter*, 5 Johns. Ch. 169, the Chancellor stated the general rule to be, that an injunction would be confined to restrain future waste, as an action of trover would lie for what had been cut.

⁵ *Kane v. Vanderburgh*, 1 Johns. Ch. 11. It is scarcely possible to estimate the injury which the destruction of a few valuable timber-trees, by a tenant for life on a farm with a scanty stock of wood and timber, may occasion to the owners of the inheritance. Hence bills to restrain waste of this character are not to be frowned upon by the court. Per Sanford, A. V. Ch., in *Sarles v. Sarles*, 3 Sandf. Ch. 601.

ted ; for if he ascertain that the tenant is about to commit any act which would operate as a permanent injury to the estate, this court will interfere and restrain him from doing such act. If, therefore, he begins, or threatens, or shows any intention to commit waste, an injunction will be granted.¹ And a court of equity will grant an injunction to restrain the tenant from doing a certain act, whether it amounts to waste or not, provided it be directly contrary to the tenant's own covenant, or even in contravention of an agreement, which may be inferred from the course of dealing between the parties.² In a case where a tenant from year to year having received notice to quit, was proceeding to take away the crops, manure, &c., contrary to the usual course of husbandry, and to cut and damage the hedge-rows, &c., the Chancellor granted an injunction, observing that the principle applied equally to the case of a tenancy from year to year, as to a lease for a longer term.³ And where the tenant, in revenge of the landlord's having distrained on him, threatened to sow the land with mustard-seed, which is very injurious to the soil, and requires many years to eradicate, the court granted an injunction to prevent him.⁴ In another case, where the tenant cut timber and firewood from the estate for the purpose of selling it, abusing his privilege of taking such reasonable firewood as was necessary for his own use, the court granted an injunction to prevent him from proceeding any further.⁵ So where the defendant had a lease for four years of certain land, the principal value of which consisted in pine timber growing thereon, and was proceeding to cut large quantities of it, and saw it up in his mills ; he was restrained from cutting any more, or from removing that already cut down.⁶

§ 692. If a lessor excepts the trees in his lease, the lessee is not entitled to take his usual estovers ; and in such case, waste will not lie against the tenant for cutting trees, because they are not parcel of the thing leased, but trespass will be the appropriate remedy.⁷ As a tenant for life or for years has no property in timber-trees, though he has a special interest in the fruit and shade, as long as they are annexed to the land,⁸ he will be restrained from cut-

¹ *Gibson v. Smith*, 2 Atk. 182; *Mayor v. Hedger*, 18 Ves. 355; *Kimpton v. Eve*, 2 Ves. & B. 349; *Caldwall v. Baylis*, *supra*.

² *Grey de Wilton v. Saxon*, 6 Ves. 106; *Onslow v. —*, 16 *id.* 173.

³ *Onslow v. —*, *supra*. See also *Pulteney v. Shelton*, 5 *id.* 147; *Lathropp v. Marsh*, *ib.* 260.

⁴ *Pratt v. Brett*, 2 Madd. 62.

⁵ *Courtown v. Ward*, 1 Sch. & L. 8; *Bonnett v. Sadler*, 14 Ves. 526.

⁶ *Watson v. Hunter*, 5 Johns. Ch. 169.

⁷ *Vin. Abr. Waste (M.)*, pl. 26.

⁸ *Herlakenden's case*, 4 Co. 62; *Dyer*,

ting timber, even where there is a demise of a farm expressly including the trees; for though there is no express exception as to the cutting, the law makes the exception, and the lessee cannot cut them down, because he has but a limited interest.¹ And where a lease contained covenants not to *convert* any meadow land, with other usual covenants in the lease of a farm, showing clearly the nature of the lease, for the purpose of tillage as a farm; Lord Eldon granted an injunction to restrain the defendant, a tenant to the plaintiff, from breaking up meadow for the purpose of building, *contrary to the covenants of his lease*.² At a later period, however, he granted an injunction to restrain a tenant from committing waste by ploughing up pasture land, although there was no express covenant not to convert pasture into arable, on the ground that a covenant contained in the lease, to manage pasture in a husband-like manner, was equivalent to it.³ So if a tenant takes a lease of lands adjoining his dwelling-house, and, with the consent of the lessor, throws part of the demised premises into his ornamental grounds, going to considerable expense in permanent improvements, by planting and otherwise; though the lessor may have reserved, in the amplest manner, all trees and shrubs that may be planted on the premises, yet, after having stood by and seen the improvements going forward, giving at least an implied assent to them, he will be enjoined from injuring the beauty of the grounds by cutting down the trees,⁴ for where a man encourages another to lay out money, upon the supposition that he never means to exercise his legal rights, equity will not permit him to exercise them.⁵

§ 693. An injunction will also be allowed to restrain a lessee from pulling down, damaging, or destroying, contrary to his covenant, any of the buildings, trees, bark, wood, underwood, hedges, or fences, or from sowing the farm with any pernicious crop, and from removing from off the farm any of the hay or straw, dung or manure, produced or made thereon.⁶ Or to prevent a lessee from making such alterations in a dwelling-house, by changing it into a store or ware house, as would produce a permanent injury to the building.⁷ But the rule is not so rigid when applied to city leases; for where a tenant, for a term of eight years, in the city of New York, pulled down a fence, and proceeded to build a stable on the

¹ *Herring v. Dean of St. Paul's*, 2 Wils. Ch. 11; *Liford's case*, 11 Co. 46; *Dyer*, 87.

² *Grey de Wilton v. Saxon*, 6 Ves. 106.

³ *Drury v. Molins*, 6 Ves. 323.

⁴ *Jackson v. Cator*, 5 Ves. 691.

⁵ *Brydges v. Kilburne*, 5 Ves. 689.

⁶ *Pratt v. Brett*, 2 Madd. 62; *Kimpton v. Eve*, 2 Ves. & B. 349.

⁷ *Douglass v. Wiggins*, 1 Johns. Ch. 485.

rear of the lot, the court refused to restrain him from such proceeding; on the ground that, if it amounted to waste, the party had a perfect remedy at law for the injury; and that the Court of Chancery only interfered to prevent future waste, in cases where there are some special grounds for equitable interference, as where waste has already been committed, or a discovery is necessary, or the complainant has no remedy at law. In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplicity of suits.¹

§ 694. We have observed, that the immediate reversioner could alone maintain an action at law for waste, the ground of interposition in general being that of a privity of estate between the parties; but equity does not follow the law in this respect, for a remainderman in fee may have an injunction to stay waste against an underlessee, notwithstanding the intermediate estate.² And it will be granted in favor of the mesne remainderman for life; for though he has no right to the timber, yet, if the first tenant for life should die, he would have an interest in the mast and shade.³ A termor who has built upon land which he holds at a ground-rent is, upon a proper case shown, as much entitled to an injunction to stay waste against his under-tenant, as if he had an estate of inheritance.⁴ So a mortgagee in possession, who commits waste by cutting timber, without applying the money arising from the sale of such timber in reducing the mortgage debt, will be restrained in equity, upon a bill filed by the mortgagor. A mortgagor in possession will also be restrained from committing waste, for the whole estate is the security, and ought not to be diminished.⁵ But he may cut underwood at seasonable and proper times; Lord Eldon remarking that there never was an instance of preventing the mortgagor from taking the ordinary fruit of the land.⁶ Trustees to preserve contingent remainders are entitled to all remedies of law and equity, to support their trust, and may therefore file a bill for an injunction against a tenant for life committing waste.⁷ In the case, also, of joint tenants and

¹ *Winship v. Pitts*, 3 Paige, 259.

² *Farrant v. Lovell*, 8 Atk. 728; *Roswell's case*, 1 Rol. Abr. 377; *Tracy v. Tracy*, 1 Vern. 28; *Robinson v. Litton*, 8 Atk. 210.

³ *Mollineux v. Powell*, 8 P. Wms. 268, n.; *Perrott v. Perrott*, 8 Atk. 94; *Davies v. Leo*, 6 Ves. 784.

⁴ *Mayo v. Feaster*, 2 McCord, Ch. 137.

⁵ *Brady v. Waldron*, 2 Johns. Ch. 148; *Farrant v. Lowell*, *supra*.

⁶ *Hampton v. Hodges*, 8 Ves. 105; *Brumley v. Fanning*, 1 Johns. Ch. 501.

⁷ *Garth v. Cotton*, 1 Dickens, 188; *Stansfield v. Habersham*, 10 Ves. 278.

tenants in common, with respect to whose acts of waste, as between themselves, the common law has provided no remedy; courts of equity will interfere, when it appears that waste has been committed or threatened by one tenant in common, who has become possessed of the whole premises.¹

§ 695. Relief will not be granted on slight or uncertain grounds; it is not sufficient for a plaintiff to swear merely that he has been informed and believes that the defendant intends to commit waste; or upon a simple apprehension that he means to do mischief, when he denies any such intention; but there must appear to be an actual attempt to commit waste, or some act from which the intention is fully evinced, as sending a surveyor to mark out the trees, or the like.² Threats, however, will form a sufficient ground for an injunction; for it is not necessary to stay until waste is actually done.³ And it has been granted against a tenant for life, who insisted upon a right to commit waste, where he had none, although no waste was in fact committed.⁴ And to entitle a party to relief by injunction on the specific ground of waste, it must appear that the property in dispute is actually affixed to the freehold, and is not a mere movable fixture. For, where a bill was filed praying an injunction and account, stating that the defendant had committed waste by destroying a dove-cot, and by removing the locks from the doors of the house, the chains from the lawn, the statues, images, and fences from the pleasure-ground, wardrobes, presses, and closets, forming part of the wainscot of the house; the Lord Chancellor in giving his judgment said, "The foundation of this motion for an injunction is, first, a clear act of waste; and, second, an act removing things supposed to be fixed to the freehold, wainscot, presses, &c. As to the dove-cot, a clear act of waste is proved; therefore, against such waste, the injunction must be revived. But I cannot grant it against removing the presses, &c., which are mere personal property, if not affixed to the freehold."⁵

§ 696. Neither will an injunction to stay waste be granted where

¹ *Hawley v. Clowes*, 2 Johns. Ch. 122; *Twort v. Twort*, 16 Ves. 182; *Hole v. Thomas*, 7 *id.* 589.

² *Jackson v. Cator*, 5 Ves. 688; *Hanson v. Gardiner*, 7 *id.* 809.

³ *Gibson v. Smith*, 2 Atk. 182; *Oxford v. Richardson*, 6 Ves. 706; *Barry v. Barry*, 1 Jac. & W. 658.

⁴ *Gibson v. Smith*, *Barnardiston*, 497. An injunction will not be allowed to prevent the repetition of a trespass in entering and cutting down timber on land owned by the plaintiff, and of which he is in possession; for he has a remedy at law. *Stevens v. Beekman*, 1 Johns. Ch. 818.

⁵ *Kimpton v. Eve*, 2 Ves. & B. 849.

the plaintiff's title is denied; especially if there has been unnecessary delay in trying the title at law;¹ nor where the parties are litigating their adverse rights in a court of law, or the defendant has been a long time in possession, claiming adversely.² The question of disputed title must be first disposed of by the proper jurisdiction. But in a case where the defendant to a bill to stay waste stated that he was in possession by a title of his own; but admitted that he was let into possession by the plaintiff's tenant, in breach of his duty to his landlord, the defendant's title was, for this purpose, held to be no better than the tenant's; and he was not permitted to avail himself of a possession so improperly obtained, and was, on that account, restrained.³ And where the right is doubtful, equity will sometimes restrain a tenant until the right is determined at law.⁴ If a tenant, defending an ejectment, makes use of the interval to do all the mischief he can, by breaches of covenant and wilful waste, an injunction will be granted at common law, though it is otherwise if an ejectment has not been brought;⁵ and we have seen, that the Revised Statutes of New York provide a remedy in a court of law for such a case.⁶ But if a tenant covenants not to plough pasture, and if he should, to pay at the rate of twenty shillings an acre per annum, the court will refuse an injunction, as the damage has been settled between the parties themselves, and a price set for ploughing: nor, on the other hand, will the court assist a defendant coming in for relief against such payment.⁷

§ 697. An estate for life is always *impeachable for waste*, unless the contrary is expressly provided for.⁸ And a tenant for life without impeachment of waste, who makes an unconscientious or malicious use of his power, will be restrained and controlled by a court of equity, whenever his acts tend to the destruction of the inheritance. As where the tenant for life, "without impeachment of waste," of Raby castle, had stripped the castle of the doors, windows, &c., and was proceeding to pull it down, he was enjoined from any further proceeding, and required to repair it forthwith.⁹

¹ Higgins v. Woodward, 1 Hopk. 342.

² Storm v. Mann, 4 Johns. Ch. 21; Jones v. Jones, 8 Mer. 173; Pillsworth v. Hopton, 6 Ves. 51.

³ Courthope v. Mapplesden, 10 Ves. 290; Norway v. Rowe, 19 Ves. 154.

⁴ Sunderland v. Newton, 3 Sim. 450.

⁵ Lathropp v. Marsh, 5 Ves. 259.

⁶ Ante, § 690.

⁷ Woodward v. Gyles, 2 Vern. 119.

⁸ Cole v. Peyson, 1 Ch. R. 57; Gower v. Eyre, Coop. 156; Wright v. Atkins, 19 Ves. 299. Ante, § 855.

⁹ Barnard's case, Prec. Ch. 454; s. c. 2 Vern. 788; Packington's case, 3 Atk. 215; Clement v. Wheeler, 5 Fost. 361; Morris v. Morris, 15 Sim. 505; Wellesley v. Wellesley, 6 id. 497.

Upon this principle, also, equity will prevent the cutting of timber of too young a growth,¹ or trees planted for the protection or shelter of the several mansion-houses belonging to the estate, or for ornament, or which grow in lines, vistas, walks, or other grounds belonging to the mansion.² And a tenant cannot justify waste under a parol license; and the fact that the license was on condition that he should clear and seed the land on which he cut the timber does not render such a license admissible.³

¹ *Chamberlayne v. Dummer*, 1 Bro. v. *McNamara*, 8 *id.* 70; *Day v. Merry*, 16 Ch. 166; *Strathmore v. Bowes*, 2 *id.* 88. Ves. 375; *Leeds v. Amherst*, 2 Phill. 117.

² *Downshire v. Sandys*, 6 Ves. 110; ³ *McGregor v. Brown*, 10 N. Y. 114; *Tamworth v. Ferrers*, *ib.* 419; *Williams* 2 N. Y. R. S. 384.

CHAPTER XIV.

OF POSSESSORY REMEDIES.

SECTION I.

THE ACTION OF EJECTMENT.

§ 698. AFTER the tenancy has expired, by its own limitation, or has been terminated by acts of the parties, as by a forfeiture, notice to quit, or the like, the landlord's right of possession again becomes complete, and he may at once exercise it, by an entry upon the premises; or he may if he thinks proper call in the law to his assistance, and receive possession at the hands of the sheriff.¹ The ordinary common-law remedy, by which he proceeds to recover possession, is the action of ejectment; and this is in fact the only remedy to which he can resort, in any case where the statute has not authorized a summary proceeding for the recovery of possession. It is strictly a possessory action, and the party claiming possession recovers on his general right of entry, whether his title be to an estate in fee, for life, or for years.² At common law, in order to support the fiction of a lease, entry, and ouster, upon which the action was founded, an actual entry upon the land, by the claimant, was formerly necessary before bringing the action, and while on the land he executed a lease to some person who suffered himself to be turned off by a convenient friend, provided for the purpose; for, according to the old law of maintenance, it was a penal offence to convey a title to another, when the grantor himself was not in possession. The modern action is not confined to the trial of disputed titles, yet the necessity of the formal entry

¹ It was at one time held in England, and is still the law in some States, that, since the statutes of forcible entry and detainer, the landlord could not use force to regain possession or expel the tenant; but the law is now settled otherwise in England, and in some, if not most, of the United States. See *ante*, §§ 581, 582.

² *Jackson v. Brownson*, 7 Johns. 227; *Penn v. Divellin*, 2 Yeates, 309; *Tidd*, 1190.

still limits the remedy to cases in which the claimant has a present right of possession, whether the conventional relation of landlord and tenant subsists or not. The principles of the action remain the same, and although its proceedings have been changed, and much of its quaint and useless machinery abolished, both in England and the United States; the right to make an entry continues to be requisite, though the entry itself is unnecessary.¹

§ 699. According to the common-law rule, this action may be brought against any person in possession, by one having a present exclusive right of possession.² By the Revised Statutes of New York, no person can recover in ejectment unless he has at the time of commencing the action a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial. If the premises for which the action is brought are actually occupied by any person, such occupant must be named defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership, on the premises claimed, or some interest therein at the commencement of the suit. It can only be maintained for real property corporeal, upon which an entry can be made for something tangible, of which the sheriff can deliver actual possession.³ It does not, therefore, lie for property which in legal consideration is not tangible, as for a mere rent, common in gross, watercourse, or other incorporeal hereditament which passes only by grant.⁴ But in general it lies for any thing demisable, as for a common appendant or appurtenant, watercourse, fishery, or the like, if demanded with the land in respect of which it is claimed; for the sheriff, in giving possession of the land, gives possession of the hereditament.⁵ The reservation to the grantor, "of the right and privilege of erecting a mill-dam at

¹ *Hawk v. Senseman*, 6 S. & R. 21; 251; *Jackson v. Selover*, 10 Johns. 368; *Clay v. White*, 1 Munf. 162; *Rugge v. Ellis*, 1 Bay, 107; *Young v. Irwin*, 2 Hayw. 11; *White v. St. Guiron's*, 1 Minor, 381; *Taylor v. Buckner*, 2 A. K. Marsh. 18; *Shearman v. Irvine's Lessee*, 4 Cranch, 367. In Alabama, the action of trespass to try titles has been substituted for the actions of ejectment, and trespass for meane profits, and performs the office of both. *Bullock v. Wilson*, 3 Port. 382.

² *Colston v. McVay*, 1 A. K. Marsh.

³ *Child v. Chappell*, 9 N. Y. 246.

⁴ *Jackson v. Buel*, 9 Johns. 298; *Jackson v. May*, 16 id. 184; *Black v. Hepburne*, 2 Yeates, 381; *Doe v. Craig*, 8 Green, 191; 3 Bl. Com. 206; *Challenor v. Thomas*, Yelv. 148; *Adams's Eject.* 21.

⁵ *Baker v. Roe*, Ca. Temp. Hardw. 127; *Newman v. Holdmyfast*, Stra. 64; *Bull. N. P.* 99.

a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee," is such an interest in the land as may be recovered in ejectment.¹ But the grant of a privilege to erect a machine, and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without an actual entry and location, confer a right to this action.²

§ 700. At common law, also, when a lease for years was granted to a tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term; and was, consequently, without remedy to recover back his possession whilst the term lasted, although the tenant should neglect to pay rent, or otherwise disregard the conditions of his grant.³ This, upon a lease of any consequence, became a serious evil to landlords, for the tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be left without a sufficient distress to satisfy the rent. In order to obviate this difficulty, the practice was adopted to insert in the lease a proviso, declaring the lease forfeited if the rent remained unpaid for a certain time after it became due, or if any other covenant was broken by the lessee, and empowering the landlord to re-enter and re-occupy his lands; and without such a clause in the lease, as we have observed in treating of the subject of a breach of condition, he would not be entitled to re-enter. We have already had occasion to notice the embarrassing particularity necessary to be observed in making a demand of rent, in order to take advantage of a forfeiture for its non-payment. The provisions of the statute 4 Geo. II. c. 28, dispensing with the technicalities of the common-law demand, where six months' rent is in arrear, and there is no sufficient distress upon the premises, have been generally adopted in the United States, except in Pennsylvania, where the common law prevailed until very recently.⁴

§ 701. If upon the trial of such a cause in New York, it shall be proved, or if upon judgment by default against the defendant it shall appear to the court by affidavit, that the landlord had a

¹ Jackson v. Buel, *supra*.

² Jackson v. May, *supra*.

³ Jackson v. Hogeboom, 11 Johns. 168.

⁴ McCormick v. Connell, 6 S. & R. 151. In Vermont, ejectment lies for non-pay-

ment of rent without any previous demand, the tenant having a right to remain by paying the rent and costs at any time before judgment. *Maidstone v. Stevens*, 7 Vt. 487. *Ante*, § 498, and note.

right to commence the action, according to the provisions of this section of the statute, the plaintiff in the action will have judgment to recover the possession of the demised premises and his costs, and the court will award execution therefor.¹ A recent statute of the same State has also provided an additional mode of re-entry, in cases where there may be sufficient goods on the premises to satisfy the rent, by substituting a fifteen days' notice of the landlord's intention to re-enter, instead of showing that there was no sufficient distress on the premises. This enactment seemed to follow, as a necessary consequence of abolishing distress for rent; but we have already discussed this subject under the head of conditions, and need not, therefore, enlarge upon it in this place.²

§ 702. Where the tenancy has terminated, by lapse of time, or by the death of the person upon whose life the estate was limited, a right of entry at once vests in the lessor, and no previous demand is necessary, as a preliminary to an action of ejectment.³ But in case of a tenancy at will, or from year to year, notice to quit must be first served upon the tenant in possession; for it is only after the relation of landlord and tenant has ceased to exist that the withholding of the premises becomes unlawful, and the landlord's right of possession commences. We have seen, in a former part of our work, when, and under what circumstances, a notice to quit is necessary; and it may be further observed that there are cases where, although no technical notice to quit is required, yet a reasonable demand of possession is necessary to complete the landlord's right of action. Thus, where a party is let into possession, pending a negotiation for a sale or lease, a demand of posses-

¹ 2 R. S. 505. The affidavit entitling the plaintiff to judgment, on the default here referred to, may be filed in the clerk's office, and no motion in court is necessary for the purpose. *Livingston v. Conner*, 7 Wend. 521. And though, by the statute, the service of the declaration is substituted for the formal demand of rent, which, at common law, must have been made upon the day when the forfeiture accrued, in case of non-payment, still it is not necessary that the day of the demise in the declaration should be the very day of the service; it is enough if the day of the demise be after the rent became due; for the title of the lessor must be taken to have accrued on the day when the forfeiture would have accrued at common

law, by the non-payment of rent. *Doe v. Shawcross*, 3 B. & C. 752.

² *Ante*, § 801.

³ At the expiration of a lease of land, a building erected thereon by the lessee was wrongfully continued upon the lot, by those claiming under him. Ejectment being brought for the lot alone, by metes and bounds against parties occupying separately the different stories of the building, it was held that the action would lie against all the defendants, as being joint trespassers on the land, in using it to uphold the building, and that the plaintiff was not bound to elect against which one she would proceed. *Pearce v. Ferris's Ex'rs*, 10 N. Y. 280.

sion, or something equivalent, is necessary; because, being let into possession, he becomes a tenant at will until such tenancy is determined.¹ And if a tenant hold over after the termination of his lease, being in treaty for a new one;² or a party be let into possession under a void or imperfect lease;³ in either case, the entry being lawful, the possession remains so until his right of possession is determined by a demand of possession.⁴ Any thing, however, that amounts to notice to him that his possession will be considered unlawful, appears to be equivalent to a demand of possession; thus a threat to take measures to recover possession was held a sufficient demand.⁵ But a disclaimer of the plaintiff's title, by the party in possession, renders a demand unnecessary;⁶ and a demand of the wife of the party on the premises is sufficient.⁷

§ 703. We have seen that, at common law, a mortgagee may eject a mortgagor who is in possession of the mortgaged premises, on non-payment of the mortgage-money upon the day stipulated, without giving notice to quit, or even making any demand of possession, although the Revised Statutes have abolished the action of ejectment in such a case in New York. And where the premises are demised to a third person, subsequent to the mortgage, the mortgagee may maintain ejectment against him, whether the demise were for a term of years, or from year to year, without giving any notice to quit, for the lessee is not tenant to the mortgagee; and in such case the mortgagee cannot maintain ejectment until after the expiration of the term.⁸ If the action be brought against one who became tenant to the mortgagor since the mortgage, the

¹ *Right v. Beard*, 18 East, 210; *Doe v. Stanion*, 1 M. & W. 700. So where a licensee had been suffered to stay and make improvements, *Chicago, B. & Q. R. v. Knox College*, 84 Ill. 195, 202.

² *Doe v. Stennett*, 2 Esp. 717.

³ *Doe v. Edgar*, 2 Bing. N. C. 508.

⁴ *Denn v. Rawlins*, 10 East, 261; *Doe v. Jackson*, 1 B. & C. 448.

⁵ *Doe v. Price*, 9 Bing. 856; *Ball v. Cullimore*, 2 Cr. M. & R. 120.

⁶ *Doe v. Thompson*, 1 Nev. & P. 215. And see *ante*, §§ 472, 522.

⁷ *Roe v. Street*, 2 Ad. & E. 829. The statute 4 Geo. II. dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises, as well as six months' rent in arrear; and it is still necessary for the lessor to comply with all the formalities of the common

law, before he can proceed upon a clause of re-entry for non-payment of rent, if a sufficient distress can be found. *Doe v. Wandlass*, 7 T. R. 117; *Jackson v. Wyckoff*, 5 Wend. 58; *Jackson v. Harrison*, 17 Johns. 66. But an insertion in the proviso, that the right of re-entry shall accrue upon the rent being lawfully demanded, will not render a demand necessary if there be no sufficient distress; for it is only stating in express words that which is in substance contained, from the principles of the common law, in every proviso of this nature. *Doe v. Alexander*, 2 Maule & S. 525; *Ludwell v. Newman*, 6 T. R. 458.

⁸ *Evans v. Elliot*, 9 Ad. & E. 842; *Keech v. Hall*, 1 Doug. 21; *Thunder v. Belcher*, 8 East, 449. See *ante*, § 121 and notes. *Doe v. Wharton*, 8 T. R. 2.

declaration should be upon the demise of the mortgagee only. Where, however, the lease was prior to the mortgage, the mortgagee is only an assignee of the lessor, with no greater rights than any other assignee. The action may therefore be on the demise of the mortgagee alone, or on the several demises of the mortgagor and mortgagee, but not on their joint demise.¹ The defendant may avail himself of any defence which his lessor, the mortgagor, might set up, if he had appeared; but he cannot set up the title of a third person. And where, in ejectment on the several demises of a mortgagor and mortgagee, the defendant offered to prove that seven or eight years back, and after the execution of the mortgage, he brought ejectment against the mortgagor, who was then in possession; that the cause was referred to arbitration, and that the award was in favor of him, the present defendant, who thereupon entered under a writ of possession, and had occupied the premises ever since; it was held that these proceedings were not admissible in evidence against the mortgagee, although he was present at one of the meetings before the arbitrator, but took no part in the proceedings.² And the mere fact of the mortgagee having received interest on his mortgage, down to a time subsequent to the date of the demise in the declaration, is no recognition of the right of the mortgagor to the possession, up to the time such interest was paid, so as to be a defence for a defendant who was tenant to the mortgagor.³

§ 704. With respect to the requisites of the complaint in an action of ejectment, we may observe, that it is necessary to describe with particularity the nature of the property demanded. Thus when a common is to be recovered, it must be described as appendant or appurtenant to certain land; if a watercourse, as land covered with water.⁴ But although a plaintiff must truly describe the premises claimed, he is not bound to set forth the nature of the estate, nor the quantity of the interest claimed by him; and he has been allowed to recover an undivided share, although in his declaration he claimed the whole of the premises;⁵ or where he gave evidence of a tract of land, called in the patent Feltigraw's Fortune, which was also known by the name of Felty's Fortune,

¹ Doe v. Adams, 2 Cr. & J. 232.

² Doe v. Webber, 1 Ad. & E. 119.

³ Doe v. Cadwallader, 2 B. & Ad. 478.

⁴ Co. Lit. 4 a; Challenor v. Thomas,

supra; Doe v. Plowman, 1 East, 441;

Vice v. Burton, 2 Stra. 891.

⁵ Harrison v. Stevens, 12 Wend. 170;

Van Alstyne v. Spraker, 18 id. 578.

and so called in the declaration.¹ If he describes the land in his declaration by courses and distances, without naming any monument except the point begun at, and without reference to any survey, or to the lines of the lot, he can only recover according to the direction of the magnetic needle, at the time when the action was brought.² And, as a general principle, the lines of a tract of land originally run by course and distance, without calls, must be confined to the courses and distances, and cannot be extended beyond them.³ The ancient rule required the description of the premises to be so certain, that the sheriff might know exactly of what to deliver possession; and such is still the rule in some of the States.⁴ But that rule was subsequently abolished in England; and it is their practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril.⁵ This relaxation of the rule, however, opened the way to numerous and vexatious applications to correct errors of the sheriff in delivering possession; in consequence of which, the Supreme Court of New York laid down the rule, that where a general verdict is given for the plaintiff, he is restricted to the taking possession of so much only as he gave evidence of his title to on the trial.⁶

§ 705. No proof of title is required in this action when it is brought by a landlord, since if a tenant has once recognized the title of the plaintiff, and treated him as his landlord, by accepting a lease from him, or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted, and that, whether the action be debt, assumpsit, covenant, or ejectment; ⁷ for it is a general rule, founded on reasons of public policy, that a tenant shall never be permitted to controvert his landlord's title,

¹ *Fouke v. Kemps*, 5 Har. & J. 185.

² *Brooks v. Tyler*, 2 Vt. 848.

³ *Giraud v. Hughes*, 1 Gill & J. 249; *Thomas v. Godfrey*, 8 *id.* 142.

⁴ *Fenwicks v. Floyd*, 1 Har. & G. 172; *Clark v. Clark*, 7 Vt. 190; *Sawyer v. Fitts*, 4 Stew. & P. 365; *Bindover v. Sindercombe*, 2 Ld. Ray. 1470.

⁵ *Cottingham v. King*, 1 Burr. 623, 630; *Connor v. West*, 5 *id.* 2872.

⁶ *Seward v. Jackson*, 8 Cow. 427. The Revised Statutes of New York require that the premises shall be described with convenient certainty, designating the number of the lot or township, if any, in which they are situated; if none, stating the

names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds, or in some other way, so that, from such description, possession of the premises claimed may be delivered. And if the plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in the declaration. 2 R. S. 804, §§ 8, 9.

⁷ *Townsend v. Davis*, Forrest, 120; *Roe v. Prideaux*, 10 East, 158; *Doe v. Wilkinson*, 8 B. & C. 413; *Barwick v. Thompson*, 7 T. R. 488; *Doe v. Pegge*, 1 *id.* 758. *Ante*, § 629.

or set up against him a title acquired by himself during his tenancy, which is hostile in its character to that which he acknowledged in accepting the demise.¹ And this rule extends to a tenant holding over, as well as to an under-tenant, assignee, or other person claiming under the lessee;² and is applicable to every species of tenancy, whether for years, at will, or by sufferance.³ As a tenant is not permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during the tenancy,⁴ if he takes a lease from a third person, it is void, and cannot work an adverse possession against his landlord; for the possession of a tenant is the possession of his landlord.⁵ Nor can he render his possession adverse, except by an open and notorious act; for if he takes a secret conveyance in fee, of the land, from one claiming to be owner, and keeps it secret, the character of his possession is not changed. So an adverse claimant, who gets into possession of land by tampering with the tenant, cannot resist the landlord's claim, where the tenant himself could not.⁶ But a lease unfairly or fraudulently obtained from a party already in possession of the land will not prevent him from contesting the title of the lessor.

¹ *Jackson v. Harper*, 5 Wend. 246; *Sharpe v. Kelley*, 5 Den. 431; *Doe v. Smythe*, 4 Maule & S. 847; *Doe v. Baytup*, 8 Ad. & E. 188.

² *Jackson v. Stiles*, 1 Cow. 575; *Graham v. Moore*, 4 S. & R. 467; *Jackson v. Harder*, 4 Johns. 202; *Lewis v. Willis*, 1 Wils. 314; *Barwick v. Thompson*, 7 T. R. 488; *Taylor v. Needham*, 2 Taunt. 278; *Wood v. Day*, 1 Moore, 389; *Allason v. Stark*, 1 Per. & D. 188; *Ingraham v. Baldwin*, 9 N. Y. 45. Thus a tenant holding over; *Binney v. Chapman*, 5 Pick. 124; *Codman v. Jenkins*, 14 Mass. 98; *Shelton v. Doe*, 6 Ala. 230; *Falkner v. Beers*, 2 Doug. (Mich.) 117; *Vernam v. Smith*, 15 N. Y. 827; *Fleming v. Gooding*, 10 Bing. 549. Or the owner in fee if he takes a lease; *Eister v. Paul*, 54 Pa. St. 196. Or lessee's vendee in fee; *Phillips v. Rothwell*, 4 Bibb, 88; *Harker v. Gustin*, 7 Halst. 42; *Turley v. Rodgers*, 1 A. K. Marsh. 245; *Rose v. Davis*, 11 Cal. 135; *Russell v. Irwin*, 38 Ala. 50. Though it is otherwise if he bought in ignorance of the lease; *Thompson v. Clark*, 7 Pa. St. 62; *Cooper v. Smith*, 8 Watts, 586; *Jackson v. Davis*, 5 Cow. 129.

³ *Love v. Dennis*, 1 Harp. 70; *Williams v. The Mayor*, 6 Har. & J. 538; *Trustees v. Williams*, 9 Wend. 147. Thus one holding under a tenant at will; *Coburn v. Palmer*, 8 Cush. 124.

⁴ *Galloway v. Ogle*, 2 Binn. 472; *Graham v. Moore*, *supra*; *Jackson v. Whitford*, 2 Caines, 215; *Eister v. Paul*, 54 Pa. St. 196.

⁵ *Jackson v. Miller*, 6 Cow. 751; *Lecatt v. Stewart*, 2 Stew. 474; *Johnson v. Hinman*, 10 Johns. 292. The possession of the tenant is to be deemed the possession of the landlord, until twenty years after the termination of the tenancy; or, if there was no written lease, after the last payment of rent; notwithstanding the tenant may have acquired another title, or claimed to hold adversely. 2 N. Y. R. S. 294, § 13; Code of Pro. § 86; and see *Failing v. Schenck*, 8 Hill, 344; *Jackson v. Harper*, 5 Wend. 246; *Byrne v. Beason*, 1 Doug. (Mich.) 179; *Allen v. Chatfield*, 8 Minn. 485; *Blanchard v. Tyler*, 12 Mich. 339.

⁶ *Stewart v. Roderick*, 4 Watts & S. 188; *Galloway v. Ogle*, 2 Binn. 468; *Caufman v. Cong. Cedar Spring*, 6 *id.* 59-62; *Sharpe v. Kelley*, *supra*; *Reed v. Shepley*, 6 Vt. 602; *Jackson v. Stewart*, 6 Johns. 34; *Syme v. Saunders*, 4 Strobb. 196; *Jackson v. Harper*, 5 Wend. 246; *Chambers v. Pleak*, 6 Dana, 426; *Bank, &c. v. Mersereau*, 8 Barb. Ch. 528; *Tondro v. Cushman*, 5 Wisc. 279; *Plumer v. Plumer*, 10 Fost. 558; *Jackson v. Wheedon*, 1 E. D. Smith, 141; *Hardisty v. Glenn*, 32 Ill. 62; *Caldwell v. Center*, 30 Cal. 539.

And a tenant may acquire and set up a title consistent with that admitted by the demise; as if he purchase the premises at a tax sale, made during his term.¹ Or where the landlord threatens to turn the tenant off the land by force of arms, unless he will consent to take a lease; for the general rule is founded on the presumption of the lease being taken without fraud, force, or illegal behavior on the part of the lessor.² A tenant at sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, although he may have an action for the trespass.³

§ 706. Where the lease is *by deed*, a tenant is technically estopped from disputing his landlord's title, who is only required to produce the counterpart of the lease on the trial.⁴ Where the lease is *by parol*, it will not be necessary for him to give any evidence of his title anterior to the lease; for a holding under a plaintiff, and the expiration of the tenancy, are the only things to be proved in ordinary cases.⁵ Even an acknowledgment by the defendant, that he went into possession under the plaintiff, is sufficient to entitle him to recover; it being a simple matter of fact for the jury to determine, whether the defendant held under the plaintiff or not.⁶ But evidence of an agreement for a lease between

¹ *Miller v. McBrier*, 14 S. & R. 382; *Brown v. Dysinger*, 1 Rawle, 408; *Hockenbury v. Snyder*, 2 Watts & S. 240; *Newman v. Rutter*, 8 Watts, 51; *Gleim v. Rise*, 6 *id.* 44; *Isaac v. Clark*, 2 Gill, 1; *Miller v. Bonsadon*, 9 Ala. 317. So if he buy in the whole or part of the lessor's title at a tax or execution sale or by private purchase it is a proportionate defence to suit for rent or ejectment. *Nellis v. Lathrop*, 22 Wend. 121; *Evertsen v. Sawyer*, 2 Wend. 507; *Bettison v. Budd*, 17 Ark. 546; *Camley v. Stanfield*, 10 Tex. 546; *Elliott v. Smith*, 23 Pa. St. 181; *George v. Putney*, 4 Cush. 358.

² *Hamilton v. Marsden*, 6 Binn. 45; *Miller v. McBrier*, *supra*; *Thayer v. Soc. of United Bro.*, 20 Pa. St. 60. In an action under the statute of New York to recover possession of land for the non-payment of rent, the tenant may plead and show a partial eviction for the easement which formed a portion of the demised premises, by way of counter-claim and equitable defence, and is not driven to a cross-action. *Blair v. Claxton*, 18 N. Y. 529; *Robins v. Kitchen*, 8 Watts, 390; *Jackson v. Spear*, 7 Wend. 401; *Alderson v. Miller*, 15 Gratt. 279; *Tison v. Yawn*, 15 Ga. 491.

³ *Doe v. Murrell*, 8 C. & P. 184. A

tenant cannot dispute the title under which he gained possession. *De Rutzen v. Lewis*, 5 Ad. & E. 277; *Hall v. Butler*, 10 *id.* 204. Though he is prepared to show that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another. *Parry v. House*, Holt, 489; *Alchorne v. Gomme*, 2 Bing. 54. He may, however, dispute the title of an assignee of the reversion. *Carvick v. Blagrove*, 1 Brod. & B. 531. But where A. hires apartments by the year of B., who afterwards lets the entire house to C., who sues A. for use and occupation, A. cannot impeach C.'s title.

⁴ *Wood v. Day*, *supra*; *Wilkins v. Wingate*, 6 T. R. 62; *Roe v. Davis*, 7 East, 363. In ejectment upon a clause of re-entry, for non-payment of rent, against the assignee of the term, the lessor proved, by the subscribing witness, the execution of the counterpart of the lease; and it was held sufficient, without producing the lease itself, or proving that notice had been given to the defendant to produce it. *Id.*

⁵ *Jackson v. McLeod*, 12 Johns. 182.

⁶ *Jackson v. Dobbin*, 3 Johns. 223, 499; *Jackson v. Stewart*, 6 Johns. 84; *Jackson v. De Walts*, 7 *id.* 157.

the lessor in ejectment and the tenant will not enable the plaintiff to recover possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claims to hold adversely.¹ The non-payment and non-demand of rent for twenty years will not raise a presumption that the landlord's title is extinguished, by a conveyance to the tenant or otherwise; for the possession of the one not being consistent with the title of the other, a conveyance from such other will never be presumed, for the purpose of quieting the possession. Neither will the tenant be allowed to show that the landlord has acknowledged by parol that the title was in another.² But the rule that a tenant is precluded from denying the title of his landlord is not to be extended so as to estop him from denying the validity of rights which had no existence when he took possession.³

§ 707. There is a difference, also, whether the party has received possession from the lessor of the plaintiff, or has merely admitted his title by paying rent. In the former case, he is estopped from denying it, without any title at all;⁴ but in the latter, the defendant may rebut the presumption arising from such payment, by showing that he paid the rent under a mistake, or through misrepresentation.⁵ Even an express agreement with one who claims to be landlord does not preclude the tenant from afterwards showing that the party claiming had no title; and that the payment, or other acknowledgment, was induced by misrepresentation, or under mistake, the tenant not having been originally let into possession by the claimant.⁶ But he cannot show that his lessor had only an equitable title, or that his title was probably defective.⁷ Nor can the tenant of a mortgagor set up the title of the mortgagee to an

¹ *Jackson v. Cooly*, 2 Johns. Cas. 228.

² *Jackson v. Davis*, 5 Cow. 128. In an action by the lessee against the assignee of a lease, the plaintiff having proved the delivery of the original lease to the defendant, and the execution of the counterpart, the defendant put in the original lease, which was produced by a party to whom the defendant had assigned it, by deed reciting the lease; it was held unnecessary for the plaintiff to call the subscribing witness to prove the execution of the lease, because a party is never allowed to dispute the execution of a deed, after having taken, under such deed, all the interest it was calculated to give. *Burnett v. Lynch*, 5 B. & C. 589.

³ *Ryers v. Farwell*, 9 Barb. 615; *Despard v. Walbridge*, 15 N. Y. 874.

⁴ *Rennie v. Robinson*, 1 Bing. 147; *Fleming v. Gooding*, 10 *id.* 549; *Cooper v. Blandey*, 1 Bing. N. C. 45; *Doe v. Barton*, 8 Per. & D. 194.

⁵ *Fenner v. Duplock*, 2 Bing. 10; *Rogers v. Pitcher*, 6 Taunt. 202; *Gravenor v. Woodhouse*, 1 Bing. 88; *Brook v. Biggs*, 2 Bing. N. C. 572; *Doe v. Brown*, 7 Ad. & E. 447; *Claridge v. McKenzie*, 4 Scott, N. R. 796.

⁶ *Claridge v. McKenzie*, *supra*; *Burne v. Richardson*, 4 Taunt. 720; *Doe v. Barton*, *supra*; *Doe v. Brown*, *supra*.

⁷ *Blake v. Foster*, 8 T. R. 487; *Driver v. Laurence*, 2 W. Bl. 1259.

action brought by his lessor.¹ Although he cannot show that his lessor had no title to the premises when the tenancy commenced, he may show that the landlord holds in violation of the laws of the State,² or that his interest has since expired, — as that he has sold and conveyed the land, or that he has been evicted by title paramount, — and that, therefore, he has no right to bring the suit.³ So he may show that the lessor was only seised in right of his wife, for her life, and that she died before the covenant was broken;⁴ or that the lessor being executor, *durante minori etate*, the infant has since come of age.⁵ A lessee is also estopped from disputing his lessor's title when it has been transferred, but he may show that the transfer was not valid.⁶ A defendant entering without title, and afterwards agreeing to purchase of the lessor of the plaintiff, was held to have recognized him as landlord, and was not permitted to dispute his title.⁷ But where a tenant was in possession under an adverse title, and applied to the lessor of the plaintiff to purchase, and requested to be considered as his tenant,

¹ Doe v. Pegge, 1 T. R. 758. But the mortgagor's tenant may, on receiving notice from the mortgagee, yield thereto, and attorn and pay rent to the mortgagee and defend against the mortgagor. *Stedman v. Gassett*, 18 Vt. 846; *Magill v. Hinsdale*, 6 Conn. 464; *Fitzgerald v. Beebe*, 2 Eng. 810; *Jones v. Clark*, 20 Johns. 51; and see *ante*, § 121, and notes. Or he may buy out the mortgagee with like effect. *Pierce v. Brown*, 24 Vt. 165.

² *Satterlee v. Mathewson*, 18 S. & R. 183.

³ *Moore v. Beaseley*, 8 Ohio, 292; *Caufman v. Cong. Cedar Spring*, 6 Binn. 62; *Dimond v. Enoch*, Addis. 356; *Marley v. Rodgers*, 5 Yerg. 217; *Jackson v. Rowland*, 6 Wend. 666; *Binney v. Chapman*, 5 Pick. 124; *Willison v. Watkins*, 8 Pet. 48; *Wells v. Mason*, 4 Scam. 84; *Franklin v. Carter*, 1 C. B. 760; *Walton v. Waterhouse*, 2 Wms. Saund. 418, note; *Lunsford v. Turner*, 5 J. J. Marsh. 104; *Swann v. Wilson*, 1 A. K. Marsh. 99; *Den v. Ashmore*, 2 Zab. 261; *Hayne v. Maltby*, 8 T. R. 441; *Brudnell v. Roberts*, 2 Wils. 148; *Tilghman v. Little*, 13 Ill. 241; *Ryers v. Farwell*, *supra*; *Wild v. Serpell*, 10 Gratt. 416; *Hopcraft v. Keys*, 9 Bing. 618; *Towne v. Butterfield*, 97 Mass. 106; *Giles v. Ebsworth*, 10 Md. 383; *Wolf v. Johnson*, 80 Miss. 518; *Horne v. Leeds*, 1 Dutch. 106; *Pope v. Haskins*, 16 Ala. 323; *Russell v. Allard*, 18 N. H. 222. But not unless he has

attorned to the new title. *Holt v. Martin*, 51 Pa. St. 499. *Simers v. Saltus*, 3 Den. 214; *Whalin v. White*, 25 N. Y. 465; *Evertsen v. Sawyer*, 2 Wend. 507; *Mayor v. Whitt*, 15 M. & W. 577; *Delany v. Fox*, 2 C. B. n. s. 775, § 777; *Morse v. Goddard*, 18 Metc. 177; *Wheelock v. Warschaur*, 21 Cal. 316; *Lunsford v. Turner*, *supra*. But if he yield to a suit for possession which is brought neither against him nor his lessor, and attorns to the plaintiff therein, he cannot set it up against the lessor. *Calderwood v. Peyser*, 81 Cal. 837. And it seems to be the law that in order to discharge himself of his obligation to the lessor under whom he holds, he must, if the adverse title has not been established in a suit to which the lessor is privy, notify the lessor of the assertion of this title. *Ib.*

⁴ *Blake v. Foster*, 8 T. R. 487.

⁵ *Andrews v. Pearce*, 4 B. & P. 158. It is a good defence to an action of ejectment for a forfeiture, that the landlord, after the execution of the lease, conveyed away his title to the premises. *Doe v. Edwards*, 5 B. & Ad. 1065.

⁶ *Phillips v. Pearce*, 5 B. & C. 438; *Carvick v. Blagrave*, 1 Brod. & B. 581; *Funk v. Kincaid*, 5 Md. 404; *Blantin v. Whitaker*, 11 Humph. 818; *Russell v. Allard*, *supra*.

⁷ *Jackson v. Whitford*, 2 Caines, 215; *Jackson v. Vosburgh*, 7 Johns. 188.

he was permitted to show that the application was founded in mistake, or that the fee existed in himself, or out of the lessor.¹

§ 708. According to the New York statute, a tenant whose lease has not actually expired may be reinstated in his possession. At any time before judgment in the cause, he may either tender to the landlord, or bring into court where the suit is pending, all the rent in arrear at the time of such payment, with costs; and all further proceedings in the cause must cease. And, at any time within six months after the landlord obtains possession under an execution upon such judgment, the lessee, his assigns, or personal representatives, may tender to the lessor, his representatives, or attorney, the rent due, with costs, and all further proceedings are then to cease; and the premises must be restored to the lessee, who will hold the same without any new lease, and according to the terms of the original demise. But if the rent and costs remain unpaid for six months after the execution shall have been executed, the lessee, and all persons deriving title under him, shall be barred from all relief in law or equity (except for error in the record or proceedings), and the lessor or landlord will from thenceforth hold the premises discharged from the lease. But a mortgagee of the lease, or any part thereof, not in possession of the premises, who shall, within six months after the execution shall have been executed, pay the rent and costs, and perform all the agreements, which ought to be performed by the first lessee, will not be affected by the recovery in ejectment.²

§ 709. A tenant may also be relieved in equity; for the same statute further enacts, "the lessee, or any person claiming any

¹ *Jackson v. Cuerden*, 2 Johns. Cas. 853; *Jackson v. Newton*, 18 Johns. 355. A lease contained a proviso for re-entry, "in case the rent, or any part, should be behind and unpaid by the space of fourteen days next after any or either of the said days of payment, on which the same ought to be paid, and no sufficient distress being found in and upon the same premises, whereby to levy such rent;" at Lady-day the rent became due, and, not being paid, the landlord, in May, sent a bailiff upon the premises, for the purpose of making a distress; nothing being found on the premises, he brought an ejectment to recover possession. It was objected, that, in order to establish a forfeiture, it ought to have been shown that there was no sufficient distress for fourteen days

after the rent was due, as well as that the rent was in arrear, whereas it was only proved that there was no sufficient distress on one day in May, which might have been the case upon that one day only; but the court thought this was *prima facie* evidence to entitle the plaintiff to call upon the defendant to show that there was sufficient distress upon the premises, within the terms of the proviso. *Doe v. Fuchau*, 15 East, 286.

² 2 R. S. 505, §§ 28-32. And this he may do whether the proceeding to re-enter be by action at common law, or under the statute authorizing summary proceedings. *Corning v. Beach*, 26 How. Pr. R. 289. And see, *Doe v. Roe*, 3 Taunt. 402, as to the right of a mortgagee of the lease to redeem.

interest in such lease, may within six months after execution executed on such judgment, file his bill in equity for relief, but not after that time, and if relieved in such court, he shall hold the premises without any new lease thereof, according to the terms of the original demise. But the complainant in such a bill shall not have an injunction against proceedings at law on such ejectment, unless he shall bring into court the amount the lessor shall in his answer have sworn to be due and in arrear, over and above all just allowances, and also all the costs taxed in said suit, there to remain until the hearing of the cause, or to be paid to the lessor, or good security, as the court may direct. If the lessor shall have entered into the actual possession of the demised premises, the court may direct, that so much, and no more, as he shall really have made of the said premises during his possession thereof, or as might, without wilful neglect, have made of them, be deducted from the amount of the rent in arrear to such lessor, and the costs of the ejectment, and the complainant shall be required to pay the balance before he shall be restored to the possession of the premises." ¹

§ 710. After a judgment in ejectment, the plaintiff is entitled to recover the *mesne profits* of the land, that is, a fair compensation for its use during the time he was excluded from the possession by the wrongful act of the defendant. He may, also, maintain this latter action, where he obtains possession without suit, or without prosecuting an ejectment-suit to judgment; even though it should appear that he had, before the ouster, entered into an executory contract for a sale of the premises, and that the vendee was in possession at the time of the ouster.² The plaintiff's title has relation back to the time when his right of entry first accrued, and he is considered, for all purposes of the recovery, to have been in possession from that time. The possession of any one who holds him out during that time is consequently wrongful, and, by the common law, he may bring an action of trespass to recover damages for the *mesne profits*.³ These profits, as they are termed, prior to the day of the demise laid in the declaration, may also be recovered in an action for use and occupation, if the plaintiff thinks proper to waive the tort.⁴ But use and occupation will not lie for rents and profits

¹ 2 R. S. 505, §§ 38-38.

² Leland v. Tousey, 6 Hill, 828.

³ Dewey v. Osborn, 4 Cow. 829; Duppa v. Mayo, 1 Saund. 277, a.

⁴ Van Alen v. Rogers, 1 Johns. Cas. 281; Goodtitle v. North, Doug. 584; Doe

v. Batten, Cowp. 248.

accruing subsequently to that day, as it implies a contract, and the plaintiff, having in the ejectment treated the defendant as a trespasser, at a period subsequent to the demise, is estopped from also treating him as a tenant, and bringing an action for use and occupation, the one position being manifestly inconsistent with the other.¹ And when a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt under the statute, for double the yearly value of the premises, during the time the tenant holds over; for double value is given by way of penalty, and not as rent.²

§ 711. The action lies, as we have said, against any party in actual possession of the land; but where an under-tenant holds over, after the expiration of the lessee's interest, the latter is not liable for the mesne profits, unless he has made himself a party to the trespass, by receiving rent from the under-tenant, for the time during which he held over, or the like.³ The defendant in such an action may plead in bar of the claim, any matters of defence, that would be available in an action of debt for rent; and, in general, any thing, but such as was, or might have been, controverted in the action of ejectment, as, for instance that he was not in possession of the premises, or, that he only remained in possession a certain time, or the like.⁴ He may also avail himself of the statute of limitations;⁵ but a discharge under a bankrupt or insolvent law is no bar, as the action is for unliquidated damages.⁶ He may also deduct any ground rent that shall have been paid by him; and may set off the value of such permanent improvements made by him on the premises, as he was authorized to make, to the amount of the plaintiff's claim.⁷

¹ *Birch v. Wright*, 1 T. R. 378, 387. Where a lessee enters upon land, under a lease from one in possession claiming title, and the lessor is himself afterwards evicted by title paramount, the lessee is not liable to the real owner in an action of trespass for mesne profits. *Aden v. Thayer*, 17 Mass. 298.

² *Timmins v. Rowlinson*, 8 Burr. 1608; 1 N. Y. R. S. 745, § 10. A recovery in trespass for mesne profits is only for the use and occupation of land, and does not bar an action of trespass *quare clausum fregit*, for injuries done to the premises during the same period. *Gill v. Cole*, 1 Har. & J. 408.

³ *Chirac v. Reinicker*, 11 Wheat. 280; *Burne v. Richardson*, 4 Taunt. 720; *Roe*

v. Wiggs, 5 B. & P. 380; *Doe v. Harlow*, 12 Ad. & E. 40.

⁴ *Jackson v. Randall*, 11 Johns. 405; *Jackson v. Combs*, 7 Cow. 36; *Langendyck v. Burhans*, 11 Johns. 461; *Doe v. Huddart*, 2 C. M. & R. 323; *Aslin v. Parkin*, 2 Burr. 668.

⁵ *Hare v. Fury*, 8 Yeates, 13; *Bul. N. P.* 88; 2 R. S. 311, § 50. In trespass for mesne profits after a recovery in ejectment the plaintiff cannot give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration. *Shotwell v. Boehm*, 1 Dal. 172.

⁶ *Lloyd v. Peel*, 3 B. & A. 407; *Goodtitle v. North*, 2 Doug. 584.

⁷ *Jackson v. Loomis*, 4 Cow. 168;

§ 712. As the action for mesne profits is in form an action of trespass, it cannot be maintained against executors and administrators, for the profits accruing during the lifetime of the testator or intestate;¹ nor will a court of equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But where the lessor was delayed from recovering in ejectment by a rule of a court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and equity, the court decreed an account of the profits against the defendant's executors.² The issue, when joined, is to be tried as in other cases, and if found for the plaintiff, the jury will assess the damages, at the amount of the mesne profits received by the defendant since he entered into possession. The plaintiff will be required to establish, and the defendant may controvert, the time when the defendant entered into possession; the time during which he enjoyed the profits, and the value thereof; and an ejectment will not, according to the laws of New York, be evidence of such time.³ But previous to this statute, the record of the recovery in ejectment was conclusive evidence of title in the lessor of the plaintiff from the time of the demise laid in the ejectment, and the defendant could not, in an action for mesne profits, show title in another after that time.⁴ Except where the judgment in ejectment was obtained by default, in which case an entry must be proved.⁵

SECTION II.

SUMMARY PROCEEDINGS TO RECOVER POSSESSION.

§ 713. The common-law remedy, by ejectment, to recover the possession of demised premises, from its slow and measured progress, affords, in a great majority of cases, a very inadequate secu-

Marie v. Semple, Addis. 215; 2 N. Y. R. S. 811, § 49. But if the tenant has made improvements on the land, under a contract with the owner, he will not be allowed for them in this action, when brought by a devisee, but must seek his compensation from the personal representatives of the deviser. *Van Alen v. Rogers*, 1 Johns. Cas. 281. See also *Hylton v. Brown*, 2 Wash. C. C. 165.

¹ The statute of New York furnishes an exception to this rule. 2 R. S. 51.

² *Poultney v. Warren*, 6 Ves. 78.

³ 2 R. S. 811, §§ 47, 48.

⁴ *Dewey v. Osborn*, 4 Cow. 329; *Jackson v. Combs*, 7 id. 86; *Doe v. Dupey*, 4 J. J. Marsh. 388.

⁵ *Lessee of Brown v. Galloway*, 1 Pet. C. C. 299; and see *Jackson v. Hills*, 8 Cow. 290.

rity to a landlord; and while the technical delays thereby thrown in the way prove of little or no utility to an honest tenant, they are apt to be resorted to by an unprincipled or irresponsible one, to enable him to withhold possession, and bid defiance to his landlord for an indefinite length of time. For the purpose of remedying this evil, the legislatures of most of the States, following the English statute 11 Geo. II. § 19, have provided a summary proceeding, by which the landlord may speedily recover possession of his property, where a tenant abandons the premises during the term without surrendering the lease; continues in possession after the expiration of his term; or has become unable or unwilling to recompense the landlord for the use of the premises.¹ But these statutes, it is to be observed, are confined to the particular cases specified in them; the expiration of the term referred to meaning only an expiration by lapse of time, and not by a technical forfeiture; in which latter case a landlord cannot proceed under the statute, but must resort to his action of ejectment.²

§ 714. And first, with respect to a vacant possession, we may observe, that at common law, a lessor had strictly no right to re-enter upon the land before the expiration of the term, even if the tenant had deserted the premises.³ With a view of obviating this difficulty, the New York statute provides, that if any tenant being in arrear for rent, shall desert the demised premises, and leave the same unoccupied and uncultivated, without any goods thereon subject to distress to satisfy the arrears of rent, any justice of the peace of the county may, at the request of the landlord, and upon due

¹ The statute has not abolished the formal action of ejectment in cases of this kind; but if a landlord thinks proper to resort to such an action, he must proceed strictly as at common law, and is bound to make personal service of the process upon the tenant in possession; and therefore it was held that a landlord who proceeds to obtain possession of demised premises for arrears of rent, where the premises are not actually occupied, and a declaration in ejectment cannot be served upon the lessee or his assignee, or the residence of the latter is not known, so that the service cannot be made there, must proceed as at common law, or adopt the *summary proceedings* provided by this statute; and he cannot proceed by affixing a declaration in ejectment in a conspicuous place on the demised premises, and then asking the court for a rule to plead. *Stratton v. Lord*, 22 Wend. 611;

overruling the case of *Evans v. Moran*, 12 *id.* 180.

² *Oakley v. Schoonmaker*, 15 Wend. 228. But this is otherwise in several States by statute, see *post*, § 72, & a. note § 6. In Louisiana, where rent is said to be of the essence of the contract of lease, and a lessee refuses to comply with its terms, by withholding the rent as it comes due, the lessor may have a summary judgment rescinding the contract and restoring the possession. *Chase v. Turner*, 10 La. 19; *Dreaden v. Cox*, 7 Martin, 149. Without a demand of rent on the day it is due, or any notice to quit. *Hyde v. Palmer*, 12 La. 359.

³ *Brown v. Kite*, 2 Overt. 238; *Stratton v. Lord*, 22 Wend. 611. See *ante*, § 531. But such an abandonment may be a surrender. *McKinney v. Reader*, 7 Watts, 128; *Talbot v. Whipple*, 14 Allen, 177.

proof that the premises have been so deserted, leaving such rent in arrear, and no goods thereon subject to distress, go and view the premises; and, upon being satisfied that the premises have been deserted, he shall affix a notice in writing upon a conspicuous part of the premises, requiring the tenant to appear and pay the rent due, at some time in the said notice specified, not less than five nor more than twenty days after the date thereof. At the time specified in such notice, the justice must again view the premises; if the tenant then appears and denies that any rent is due to the landlord, all proceedings must cease. If, upon such second view, the tenant, or some one for him, shall not appear and pay the rent in arrear, and there shall not be sufficient distress on the premises to satisfy the rent, then the justice may put the landlord into possession of the demised premises; and the demise of the premises to such tenant shall from thenceforth become void.¹

§ 715. Proceedings as upon a *vacant* possession can only be taken where the premises are actually abandoned by the former occupant; if he retains virtual possession, though he does not occupy personally, the landlord must proceed in the regular way pointed out in the statute.² What amounts to a vacant possession is sometimes difficult to determine. At common law, the mere fact of a tenant's not living upon the premises would not have amounted to a desertion, provided he still occupied them by his goods. Thus, where a publican removed to another house, and left beer in the cellar; or, where hay was left in a barn; or it was not known where the tenant lived; or any person was left on the premises to take care of them, the possession could not be said to be vacant.³ But where a party abandoned the house with his goods, and locked it up, and it was not known where he had gone it was held to be a clear case of vacant possession.⁴ It was so held,

¹ 2 R. S. 512, §§ 24-27; 4 Geo. II. c. 28. An appeal from the proceedings of any justice in such case may be made by the tenant at any time within three months after such possession has been delivered, to the county court of the county where the land is situated, by serving notice thereof in writing upon such justice, and by giving security to be approved by such justice to pay the landlord all costs of such appeal which may be adjudged against the tenant; and thereupon the justice shall return the proceedings had before him to the said court, within ten days after such

notice and security given, and shall give notice to the landlord of such appeal. The court must then examine the proceedings, and hear the proofs and allegations of the parties in a summary way; and may order restitution to be made to the tenant, with costs to be paid by the landlord; or in case of affirming the proceedings, may award costs against the tenant.

² Doe v. Roe, 2 Dowl. Pr. R. 399, 481; s. c. 3 *id.* 691; s. c. 4 *id.* 173.

³ Savage v. Dent, 2 Stra. 1064; Doe v. Roe, 2 Chit. 179.

⁴ Doe v. Cock, 4 B. & C. 259.

also, in another case, where the tenant ceased to reside on the premises for some months, and left them without sufficient property to answer the year's rent; although the landlord knew where the tenant was, and a servant of the tenant's was found upon the premises when the justice went to view them.¹

§ 716. It will be observed, also, that the statute referred to only gives the remedy in case the tenant deserts the premises, leaving no *sufficient* distress thereon. But since the abolition of distress for rent, the statute has become virtually obsolete, and, where the premises are entirely abandoned, it is now unnecessary for a claimant, who has the right of possession, to proceed under any legal process; for he may enter upon the premises unaided by the law, if he can find an opportunity of doing so without using force; and if trespass should be brought against him, he may justify the entry under his title.² In one case, the tenant having absconded while rent was in arrear, the landlord entered into the premises, and then brought an action under the statute, in order to bar the tenant's right, as if the premises had not been vacant. It was held on a motion to set aside the judgment and execution for irregularity, that in the eye of the law the premises were vacant, and the whole proceeding was an absolute nullity.³ But in an action of ejectment for lands belonging to the Holland Land Company, which had been surveyed, and buildings erected on some part of the tract by the company, the proceedings being as for a vacant possession; the court made a rule to admit the company in the place of the defendant, observing that the strict principles applicable to proceedings in ejectment, as for a vacant possession in England, cannot, without manifest hardship and inconvenience, be applied to the unsettled lands of this country.⁴

§ 717. With respect to the summary proceedings by which a tenant may be removed from the demised premises, in case he holds over after the expiration of his term, or refuses to pay rent, we observe that many of the States have adopted substantially the ordinary provisions of the English statutes relating to a forcible entry and detainer, and have made them applicable to all cases of an un-

¹ *Ex parte Pilton*, 1 B. & A. 369.

² *Taunton v. Costar*, 7 T. R. 481; *Taylor v. Cole*, 3 *id.* 292; *Rogers v. Pitcher*, 6 Taunt. 202; *Turner v. Meymott*, 1 Bing. 158. And perhaps the better doctrine is that the lessor may do this, even if the

premises are still occupied by the tenant, if the latter's term has expired. See *ante*, §§ 531, 532.

³ *Jackson v. Hakes*, 2 Caines, 385.

⁴ *Saltonstall v. White*, 1 Johns. Cas. 221; *Wood v. Wood*, 9 Johns, 257.

lawful detention of property. But this latter proceeding, as we shall presently see, partakes rather of the nature of a criminal prosecution, for the punishment of wrong-doing, than of a civil action for the restoration of a simple right. For this reason, New York, adhering to this well defined distinction of remedies, retains the old procedure of forcible entry and detainer, and has a separate proceeding for the removal of a tenant.¹ The statute enacts, "any

¹ In England, the process upon a forcible entry or detainer is a criminal proceeding merely. It only lies where force or violence has been used either in the entry or detainer; and upon conviction thereof a fine is imposed, and a writ of restitution awarded. 2 Chitty, Stat. 121-124. *Yager v. Wilber*, 8 Ohio, 398, 400. And this is also the case in a few of the United States. Thus, in Pennsylvania; see *Purdon*, Dig. 1861, p. 221; while the summary process for recovery by landlords of demised premises is by a separate statute, *ib.* p. 618. But in most of the United States, the proceeding upon forcible entry or detainer is a civil process for restitution; *Harrow v. Baker*, 2 Greene, Iowa, 201, conforming so far, however, to its original that it is generally begun by sworn complaint instead of a writ and summons, and a fine may be imposed; but intended mainly to restore possession to the person unlawfully deprived thereof. Hence, the summary proceeding for restitution to the landlord of the demised premises, unlawfully withheld, as it contemplated the same object, though on different grounds, was generally incorporated in the same enactment. This is the case in Maine, Massachusetts, Vermont, New Hampshire, Rhode Island, Ohio, Indiana, Illinois, Missouri, Kentucky, Wisconsin, Iowa, Michigan, California, Nevada, and Alabama. On the other hand, in New York, as stated in the text, and also in Connecticut, New Jersey, North Carolina, and Georgia, the process for landlords and that upon forcible entry, &c., were given in separate statutes. But as in the former States, the cases in which each process lies are specifically and separately set forth and distinguished one from another, there does not seem much distinction between the statutory enactments of the former and latter class of States, especially as in each class substantially the same form of proceeding, pleadings, &c., is required in the case of process by landlords and that upon forcible entry or detainer. In all these States to entitle the complainant to avail himself of this process, there must be shown either the relation of landlord and tenant, or force either in the entry or in the de-

tainer after a peaceable entry. *Andrae v. Heinritz*, 19 Mo. 890; *Young v. Smith*, 28 *id.* 65; *Dudley v. Lee*, 39 Ill. 848; *Steiner v. Priddy*, 28 *id.* 179; *Powers v. Sutherland*, 1 Duvall, 161. In some States, however, the statutory prohibition has been extended to include any "unlawful" entry or detainer, and not merely those made with "force or the strong hand." Thus, in California, Comp. Laws, 1858, c. 36, § 2, recovery is given whenever there has been "unlawful or forcible entry and detainer," or "lawful and peaceable entry and unlawful detainer;" and in Indiana, 2 Gavin & H. Stat. p. 632, § 12, in case of "unlawful or forcible entry," and "peaceable or forcible detainer;" the act being entitled "concerning the unlawful detention of lands," &c. Yet both of these statutes have been construed to exclude recovery by landlords for merely unlawful detainer after peaceable entry, and to allow process only where actual force has been used by the lessee; the word "unlawful" in the former statute being construed "forcible," and "or" in the latter "and." *McEvoy v. Igo*, 27 Cal. 375; *Short v. Biddwell*, 15 Ind. 211. So in Wisconsin, § 2 of Rev. Stat. 1858, ch. 151, which gives process against those who make "unlawful or forcible entry into lands, and detain the same, and against those who having lawful and peaceable entry, &c., unlawfully detain the same," received the same restricted construction. *Gates v. Winslow*, 1 Wisc. 650; *Jarvis v. Hamilton*, 16 *id.* 574. Similarly broad language is used in the statutes of New Hampshire; Gen. Stat. 1857, c. 231, § 23; but as specific provision is made in the same chapter for landlords, they would probably not be allowed to avail themselves of this clause also. And this is expressly declared in the statutes of Vermont; Gen. Stat. 1882, c. 46, § 13, with regard to a similar clause. In several States, however, a provision against "unlawful detainer" is the only clause under which this process for summary repossession is given to lessors. Thus, in Kentucky, Code, § 500; Illinois Stat. 1857, vol. 1, p. 621, § 1; Maine Rev. Stat. 1867, c. 94, § 1; but these are not considered

tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of any houses, lands, or tenements; and the assigns, under-tenants, or legal representatives of such tenant or lessee, may be removed from such premises by any judge of the county courts of the county, or by any justice of the peace, mayor, or recorder of the city where such premises are situated; or if in the city of New York, by the mayor, recorder, any justice of the marine court, or any one of the assistant justices of the said city, in the manner hereafter prescribed, in the following cases.¹

1. Where such person shall hold over, and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord; 2. Where he shall hold over, without such permission, after any default in the payment of rent, pursuant to the agreement under which the premises are held, and a demand for the rent shall have been made, or three days' notice in writing requiring the payment of such rent, or the possession of the premises, shall have been served by the persons entitled to the rent on the person owing the same, in the manner prescribed for the service of summons hereinafter described; 3. Where the tenant or lessee of a term of three years, or less, shall have taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment during such term; 4. Where any person shall hold over, and continue in the possession of any real estate which shall have been sold by virtue of an execution against such person, after a title under the sale shall have been perfected."²

§ 718. This statute requires notice in writing to be given to a tenant at will, or by sufferance, in order to put an end to tenancies of this description. And it is only after the expiration of such a notice, that the tenant can be said to be holding over, or that an application can be made for process to remove him, under the first subdivision of this section. Previous to issuing the process, the magistrate should therefore be satisfied by affidavit that the tenancy has been terminated as required by the statute. But where a tenant for a year holds over after the expiration of his term, without the landlord's permission, he is not entitled to notice, not being

applicable to forcible entry or detainer. It seems, therefore, that the two classes of proceeding are uniformly kept distinct.

¹ Proceedings may also be taken before the City Judge of Brooklyn, or before

any justice of the Superior Court of the city of Buffalo, where the premises are situated within those cities respectively.

Laws, 1849, p. 174; 1867, p. 754.

² 2 R. S. 518, § 28.

considered a tenant within the meaning of the statute; and to entitle him to notice at all, the holding-over must be continued for such length of time after the expiration of the term, as to authorize the implication of an assent on the part of the landlord to such continuance. And where a landlord waited three months and twelve days before instituting proceedings, he was held not to be chargeable with laches, especially since it appeared that he had attempted to obtain possession without recourse to coercive measures.¹ Where the default consists merely in the non-payment of rent, it must also be shown that the party entitled to receive it has demanded it when due, or has served three days' notice in writing requiring its payment, or the possession of the premises; there need not, however, be both a demand and notice.² The demand may be made of the tenant in possession; and the notice may be served upon him although he is not the lessee; and if two tenants hold possession jointly, a demand on one of them is sufficient.³ The notice must be delivered to the tenant, or to some person of proper age residing upon the premises; or, if the tenant cannot be found, and there is no such person residing on the premises, it may be served by affixing the notice upon a conspicuous part of the premises, where it may be conveniently read.⁴

¹ *Rowan v. Lytle*, 11 Wend. 616. Statutes similar to that of New York, requiring written notice or demand to tenants at sufferance before summary process lies, exist in Michigan; Comp. Laws, 1867, § 4985; Wisconsin, Rev. Stat. 1858, c. 89, § 84; Georgia, Rev. Code, 1868, § 4006; and New Jersey, Nixon's Dig. 1861, p. 454, § 1. In the three latter States, as in those States where written demand must in every case precede the process,—see *post*, § 728 *a*, note, § 3,—this is not perhaps open to objection. In Michigan, however, as in New York, the same statute which requires notice to tenants at sufferance, does not require it against tenants who hold over a definite term. But every tenant who enters by right, and holds over a definite term is a tenant at sufferance, and in most States has no notice before process lies for his removal, as he is already aware of the conclusion of his term by its express period of determination. *Kinsley v. Ames*, 2 Metc. 29; *Hollis v. Pool*, 3 *id.* 360; *Dunning v. Finson*, 46 Me. 546; *Alexander v. Westcott*, 37 Mo. 108. The court in New York, in the case cited, pressed by the language of the statute on the one hand, and

by the absurdity of notifying a tenant who was perfectly aware of the termination of his title on the other, held that a tenant did not become at sufferance, and so entitled to notice under the statute, until he had held over long enough to impute laches to the owner, and was intermediately a trespasser, liable to summary expulsion without notice. This novel doctrine—it may be enough to say—has never been elsewhere enunciated or countenanced; and is contrary to the elementary principles of the common law.

² *Rogers v. Lynde*, 14 Wend. 172.

³ *Geisler v. Acosta*, 9 N. Y. 227.

⁴ This notice is required to be served in the same manner as a summons is served; as to which, see *post*, § 722. The statute, it will be observed, is in the alternative that a demand of rent has been made, or notice in writing given; and, forasmuch as doubts are suggested whether the demand should not, in all cases, be a strict common-law demand, it will generally be prudent to base the proceeding upon notice, wherever a doubt exists as to the sufficiency of the demand. For various forms of notice to quit, see Appendix XXVIII.

§ 719. The jurisdiction of the assistant justices of the city of New York, under this section, extends over the whole city, and is not limited to the wards for which they were appointed; and it is immaterial where the parties reside, or the premises are situated.¹ But any judge who issues a warrant to dispossess a person, without having properly obtained jurisdiction of the matter, is a trespasser, and liable to an action, although the person dispossessed came illegally into possession.² And even if the tenant appears, and litigates the matter upon its merits, without objecting to the jurisdiction, still the magistrate gets no jurisdiction, unless it is conferred by the affidavit.³ As a general rule, however, where the subject-matter of a suit appears to be within the jurisdiction of the court, but the want of jurisdiction is to the person or place, unless such defect appears on the process given to the officer who executes it, he is not a trespasser; but where the subject-matter is not within the jurisdiction, every thing done under the warrant is absolutely void, and the officer is a trespasser.⁴

§ 720. The statute applies only to cases where the conventional relation of landlord and tenant subsists, and not where it is created merely by operation of law.⁵ It applies, however, in favor of assignees of the reversion, as well as of the lease, for they succeed to all the rights of the original landlord.⁶ Where the case made

¹ Roach v. Cosine, 9 Wend. 227.

² *Evertson v. Sutton*, 5 Wend. 281. In *Beach v. Nixon*, 9 N. Y. 85, there was a clause in the lease authorizing the landlord to proceed and dispossess the tenant under this statute, upon the breach of any of the conditions therein contained; but the Court of Appeals held that such a covenant could not confer jurisdiction to proceed under this statute, nor preclude the lessee from objecting a want of jurisdiction; that the law and not the consent of parties confers jurisdiction, and that the rule could have no practical force if consent, given in any form, could preclude inquiry as to the lawfulness of the jurisdiction.

³ *Campbell v. Mallory*, 22 How. Pr. R. 188.

⁴ *Case of the Marshalsea*, 10 Co. 75; *Hardr.* 480; *Evertson v. Sutton*, *supra*.

⁵ *Evertson v. Sutton*, *supra*; *Birdsall v. Phillips*, 17 Wend. 464, § 720; *Walls v. Preston*, 28 Cal. 224. So the assignee of rent is not entitled to this remedy, but the reversioner still is, notwithstanding the assignment. *Chamberlin v. Brown*, 2 Doug. (Mich.) 120. In Maine, *Rev. Stats.* 1867, c. 94, § 2; *Dunning v. Fin-*

son, 46 Me. 546; and New Hampshire, *Gen. Stat.* 1867, § 23, the relation of landlord and tenant need not be proved at all.

⁶ *Walter v. Van Winkle*, 10 Martin, 289; *Brown v. Betts*, 18 Wend. 29. This is so either by the express adoption of the Statute of Anne, dispensing with attornment, *ante*, § 442, or by the terms of the statutes giving the summary remedy. This is the case in Indiana, 2 *Gavin & H. Stat.* p. 358, §§ 7, 10; Illinois, *Stat. Feb.* 16, 1865, § 4; *Dudley v. Lee*, 89 Ill. 389; Kentucky, *Rev. Code*, § 501; *McMurtry v. Adams*, 8 Bush, 70; though formerly otherwise, *Helm v. Slader*, 1 A. K. Marsh. 820; Pennsylvania, *Purdon, Dig.* 1861, p. 613, § 18; Connecticut, *Gen. Stat.* 1866, tit. 1, § 352; Maine and New Hampshire, *ubi supra*; and probably in Vermont, Michigan, Ohio, Georgia, and Alabama, where the process is given in terms to the one "entitled to possession," and not to the lessor. In California, however, the remedy is confined to the original lessor. *Reay v. Cotter*, 29 Cal. 168; and the law is the same wherever neither the Statute of Anne is adopted nor the remedy extended to assigns by express terms of the statute.

by the affidavit showed that the alleged tenant had conveyed the premises to the party who instituted the proceedings, stipulating that he should retain possession until a certain period, and stated that he held over and continued in possession, although that period had elapsed, and had received a month's notice to quit; it was held that these facts did not constitute a tenancy within the statute, and that the officer had no jurisdiction.¹ For a similar reason, a mortgagor cannot be turned out of possession of the mortgaged premises under this statute, for a mortgagor is not a tenant. And where the occupant of land, instead of a reservation of certain rent, agreed to work the farm upon shares, he was not considered a tenant within the meaning of this statute, and could not be removed for a non-compliance with the terms of his agreement.² So also of a conditional agreement to purchase real estate, where the purchaser made default in payment, and being in possession held over after notice and demand.³ Nor can such a proceeding be instituted on the ground of the expiration of the term by a forfeiture, upon the breach of a condition, for the expiration of the term mentioned in the statute means an expiration by lapse of time.⁴ And where a lease contained a clause, that in case of a violation of any of its conditions, the relation of landlord and tenant should cease at the option of the former, who was thereupon to become entitled to immediate possession, *under the statute for holding over after the expiration of the term*; it was held that a default in the

¹ *Sims v. Humphrey*, 4 Den. 185. Where one of two joint lessors becomes sole owner, he may demand the whole rent, and, on a refusal, may dispossess the tenant. The statute directs the proceeding to be taken by the landlord, and no one but the person entitled to the immediate possession can obtain the order from the justice. Where the letting is joint, there can be no division of the rent as to the tenant; and a demand may be by either of the lessors, but it must be of the whole rent, and not of an undivided portion of it. *Griffin v. Clark*, 33 Barb. 46.

² *Roach v. Cosine*, *supra*. In this case, one party had executed a deed of the premises, in favor of the other, which deed was absolute on its face, but intended as a mortgage; it being, at the same time, stipulated that the grantor should remain in possession for two years free of rent, and that the grantee would reconvey on the repayment of certain advances; and it was held that the grantor could not, after

the two years, be treated as a tenant at sufferance, and dispossessed under the statute.

³ *Williams v. Bigelow*, 11 How. Pr. R. 84. A wharf or pier is a tenement within the meaning of this statute. *The People, &c., v. Kelsey*, 14 Abb. Pr. R. 372.

⁴ *Oakley v. Schoonmaker*, 15 Wend. 226; *Benjamin v. Benjamin*, 5 N. Y. 388. And where the affidavit showed that the plaintiff was a grantee claiming under the defendant, who had not yet given him possession, but alleged that the defendant had become his tenant at sufferance, and that such tenancy had been terminated by a month's notice to quit; it was held to be insufficient, for that there had as yet been no tenancy, the defendant being, in reality, a grantor in possession. *The People, &c., v. Simpson*, 14 Abb. Pr. R. 457. This is altered, however, in some other States. See *post*, § 728 a note, § 6, statutes and cases cited.

payment of rent did not constitute such a holding over as to justify this proceeding.¹ Where a tenancy at will exists, and the landlord's interest in the estate has been sold under an execution, the relation of landlord and tenant still subsists so far that the purchaser under the sheriff may proceed to obtain possession under this statute.² Tenants from year to year are also, for the purposes of this proceeding to be considered as tenants at will, and may be removed, upon a month's notice to quit, terminating with the year of the tenant's holding.³ So an owner of land, who agrees that his creditor may occupy a dwelling-house belonging to him for the term of one year, and until he pays a mortgage which the creditor holds against him, may proceed under this statute to obtain possession, on payment of the money after the first year, and on the refusal of the creditor to yield up the possession. In such a case, it is at the election of the owner, to put an end to the term at any time after the first year, by paying the mortgage, although the money should not be due for four years.⁴ But after distraining for rent in arrear, though the distress be insufficient to satisfy the rent, a landlord is not at liberty to institute proceedings under this statute, to remove the tenant; for when a forfeiture has accrued upon a clause of re-entry, for rent in arrear, the forfeiture will be waived, if the landlord afterwards does any thing which amounts to an acknowledgment of a subsisting tenancy.⁵

§ 720 *a*. The person instituting the proceeding must be entitled to the immediate possession of the premises; and where he is merely the owner of a reversion expectant on the termination of the estate of the tenant for life, who is in the actual possession of

¹ *Beach v. Nixon*, 9 N. Y. 85. The covenant in this lease, referring to summary proceedings under the statute, gives the officer no jurisdiction in a case that does not otherwise come under the statute. The law, and not the consent of parties, confers jurisdiction. And see *Van Rensselaer v. Snyder*, 13 N. Y. 299, 304. The failure of a tenant to pay taxes, which he has covenanted to pay in addition to the rent, does not authorize a proceeding under this statute. *The People ex rel. Wilson v. Swayze*, 15 Abb. Pr. R. 432.

² *Birdsall v. Phillips*, *supra*. A judgment debtor who continues in possession of the estate after his title has been divested by a sale under an execution, is a tenant within the meaning of this act, and is entitled to deny the facts upon which the summons was issued, to have a trial, and

to stay the issuing of the warrant to remove him, by giving the undertaking required in such cases; the rent which he is thereby required to secure, meaning the value of the use and occupation of the land. *Spraker v. Cook*, 16 N. Y. 567. This proceeding may be taken by any person in whom the title is at the time of its commencement, and is not limited to the purchaser under the execution. *Brown v. Betts*, *supra*. So in Massachusetts a purchaser from a lessor at will, though the will is thereby ended, may have this process. *Howard v. Merriam*, 5 Cush. 563. So in Maine, *Dunning v. Finson*, 46 Me. 546.

³ *Prouty v. Prouty*, 5 How. Pr. R. 81.

⁴ *Hunt v. Comstock*, 15 Wend. 665.

⁵ *Wilder v. Ewbank*, 21 Wend. 587; *Jackson v. Sheldon*, 5 Cow. 428.

the premises, he cannot institute proceedings against one to whom he has assumed to let the same.¹ It must also appear that the tenant holds under the agreement pursuant to which the rent is claimed to be due, at the time the proceedings are instituted; for if the tenant is then holding under some new agreement with the landlord, he cannot be dispossessed under the statute, on the ground that he is in default in the payment of rent under a prior agreement.²

§ 721. As a preliminary to this proceeding, the statute requires the landlord or lessor, his legal representatives, agents, or assigns, to make oath in writing of the facts, which, according to the preceding sections, authorize the removal of the tenant, together with a description of the premises claimed, and may present the same to one of the officers above specified. With respect to this affidavit, great particularity is required; and every fact necessary to give the officer jurisdiction must be distinctly stated.³ And without such an affidavit, the landlord, as well as the magistrate, and the officer who executes the warrant, will be trespassers.⁴ As a general rule of law, however, applicable to all affidavits of this character, it may be stated, that where certain facts are required to be proved to warrant the issuing of process, by a court of special or limited jurisdiction, if there be a total defect of proof, as to any essential point, the process will be void; but where the proof, though slight and inconclusive, legally tends to establish all the essential facts, the process will be valid, when questioned collaterally; and can only be avoided by a direct proceeding to set it aside.⁵

§ 721 *a*. The facts, and not the *evidence of facts*, should be set forth in this affidavit, and must make out a plain case; for, where an affidavit stated that B. demised the premises and afterwards died, leaving his widow, who, after B.'s death, became legally possessed of the lease, and entitled to receive the accruing rents, "and is now entitled to possession of premises," and further stated that the tenant, and those claiming under him, had, by paying rent, recognized A.'s right; it was held that the affidavit was

¹ Buck v. Binninger, 8 Barb. 391.

² Burnett v. Scribner, 16 Barb. 621.

³ Hallenbeck v. Garner, 20 Wend. 22; Hill v. Stocking, *supra*.

⁴ McCoy v. Hyde, 8 Cow. 68. Notwithstanding that the person dispossessed

came illegally into possession. *Evertson v. Sutton, supra*. Several precedents of this affidavit will be found in Appendix XXXII.

⁵ Miller v. Brinkerhoff, 4 Den. 118; Matter of Ferguson, 9 Johns. 239.

insufficient, because the first part of the affidavit did not swear to facts, but merely to matter of law, and that it should have shown how B. became possessed, either as heir, devisee, or the like; and that the second part of the affidavit was bad, because it was not a statement of facts but of evidence.¹ The affidavit must not be uncertain or contradictory, but must show which of the persons proceeded against is tenant, and which of them is an under-tenant. It should allege that the applicant for the warrant was the owner of the premises at the time of the demise; or has since become entitled thereto, showing how,² and must show how the defendant is in possession, in order that the officer before whom the proceeding is had, may judge whether it comes within the statutory description.³ It should state that the person intended to be removed is in the occupation of the premises, together with his relation to the landlord, and should name the person of whom the rent has been demanded, when a demand is necessary, together with the time when the demand was made; though if defective in these particulars, but states the demand to have been made upon the land, it is sufficient, and cannot be objected to collaterally; for the remedy, if any, is by *certiorari*.⁴ When the oath is made by an agent, it is not sufficient that he describes himself as agent, but that fact must be distinctly sworn to.⁵ It is insufficient also if it omits to state, that the holding-over is without the permission of the landlord; and it is not enough that a mere probable want of permission to hold over appears.⁶ The premises must also be described with sufficient certainty; for where the premises were described as "a certain house and lot situated in a particular village," naming the village; the description was held to be altogether too general to meet the requirements of the statute: and the fact that the magistrate, in issuing the summons, had given a more specific description, than that contained in the affidavit, could not aid the landlord, nor of itself confer jurisdiction.⁷ The affidavit

¹ *Hill v. Stocking*, 6 Hill, 817. When a man wishes to put another out of a dwelling-house, upon an affidavit and notice of two hours, it is not too much to require that he should make out a plain case in his affidavit, especially as he is allowed to be his own witness. These summary proceedings must be carefully watched, or they may be turned into a means of working great injustice and oppression. Per Bronson, J., in *Duel v. Rust*, 24 Barb. 488.

² *Buck v. Binninger*, *supra*; *Hallenbeck v. Garner*, *supra*.

³ *Wiggin v. Woodruff*, 16 Barb. 474.

⁴ *Rogers v. Lynde*, 14 Wend. 172; *Fowler v. Roe*, 1 Dutch. 549.

⁵ *Cunningham v. Goelet*, 4 Den. 71.

⁶ *Prouty v. Prouty*, 5 How. Pr. R. 81; *Simpson v. Rhinelander*, 20 Wend. 108.

⁷ *Campbell v. Mallory*, 22 How. Pr. R. 188.

may be sworn to before any person authorized to administer oaths ; except that where the proceedings are taken before one of the District Courts in the city of New York, it must be sworn before the clerk of the court, or his deputy.¹ Where proceedings have once been had, the original affidavit cannot be used as the foundation of a new proceeding under this act ; and in a case where it was so used, and the tenant turned out of possession, it was held that the proceedings were *coram non judice* and void, and that trespass lay against both landlord and judge.²

§ 721 b. On receiving the affidavit, the officer issues his summons, describing the premises of which possession is claimed, and requiring any person in possession of the premises, or claiming the possession, forthwith to remove therefrom, or to show cause before him, within such time as shall appear reasonable, — not less than three nor more than five days, — why possession of the said premises should not be delivered to such applicant. If it be a case, however, of continuing in possession after the expiration of the term, without permission of the landlord, the magistrate, if the summons be issued on the day the term expires, or on the next day thereafter, may direct the summons to be made returnable the same day, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.³ The summons should be directed to all the persons intended to be removed, by name. And where a summons was directed to W. (the original tenant), or any other person claiming possession of the premises, and, after reciting the affidavit, proceeded thus : " Therefore, in the name of the people, you, and those claiming under you, are hereby summoned," &c. ; and the constable who served the summons made affidavit of service, by giving personal notice of it to W., also by leaving a copy with H., who claims possession of a portion of the premises ; and it appeared that H. was in possession of a part of the premises of which W. was not ; the proceedings were held to be void for want of jurisdiction.⁴

¹ *The People v. Alden*, 26 How. Pr. R. 166.

² *McCoy v. Hyde*, *supra*. In a case of a tenancy from month to month, the landlord gave notice to quit on the 4th of May, but afterwards received rent to 1st of June following, and on 17th June commenced proceedings, without stating, in his affidavit, that, at the time he received the rent, he reserved his rights under this

notice to quit ; it was held that his acceptance of rent was a waiver of the notice, and that his proceeding was consequently erroneous. *Prindle v. Anderson*, 19 Wend. 891.

³ Session Laws, 1851, chap. 460, as amended by laws of 1868, p. 1930. *Duel v. Rust*, *supra*.

⁴ *Hill v. Stocking*, 6 Hill, 317. But where a proceeding was against two per-

§ 722. The summons must be served, either: 1. By delivering to the tenant, to whom it shall be directed, a true copy thereof, and at the same time showing him the original; or, 2. If such tenant be absent from his place of residence, and such place is in the city or town in which the demised premises are situated, by leaving a copy thereof at such place with some person of mature age residing on the premises; or, 3. If no such person can be found at such place, and the tenant cannot be found upon the demised premises, by leaving a copy thereof at the demised premises with some person of mature age residing thereon, or, if there be no such person residing thereon, with some person of mature age connected with the demised premises by employment in any business for which the premises are used, or, if no person residing or employed on the demised premises can be found thereon, then such service may be made by affixing such copy upon a conspicuous part of said demised premises. If the summons be returnable on the day on which it is issued, it shall be served at least two hours before the hour at which it is made returnable, and if not returnable on the same day, it shall be served at least two days before the day on which it is made returnable. The proof of the service of the summons shall state particularly the exact time, place, and manner of service, including the name of the person on whom the service was made, if it can be ascertained.¹

§ 722 *a*. Where there are under-tenants upon the premises, each one of them must be served with a copy of the summons, in order that they may have an opportunity of defending their possession; and no warrant can issue to dispossess such as have not been served. It is not necessary to serve a copy of the affidavit on

sons, both of whom were named in the affidavit, and the summons was directed to one of them, and *any other person in possession of the premises*, and both appeared before the officer, made affidavits, and had a trial by jury, without objecting to the summons; it was held to be sufficient. *Sims v. Humphrey*, 4 Den. 185; *ib.* 71.

¹ *Laws of 1857*, vol. 2, p. 509, amended by laws of 1868, p. 1930. "It shall be the duty of every person to whom a copy of a summons shall be delivered in pursuance of subdivision two or three of section thirty-two of title ten, chapter eight, part three, of the Revised Statutes, to deliver such copy to the tenant to whom the same is directed, or, if such tenant cannot be found, to his agent for the de-

mised premises, without any avoidable delay; and a copy of this section shall be written or printed upon the outside of every such copy. If neither the tenant nor his agent can be found for that purpose, then the person to whom such copy is delivered shall take the same to the magistrate by whom the summons is issued, at the time and place named therein, and inform him that the tenant cannot be found. Every person who shall wilfully violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not less than thirty days nor more than one year." *Laws 1868*, p. 1930.

which the summons is founded.¹ If, at the time appointed in the summons, no sufficient cause be shown to the contrary, and due proof of the service of the summons be made to such magistrate, he shall thereupon issue his warrant to the sheriff of the county, or to any constable or marshal of the city or town where the premises are situated, commanding him to remove all persons from the said premises, and to put the applicant in possession thereof.² There is no sufficient proof of the service of the summons, without showing personal service on the tenant, or that he was absent from his last or usual place of residence; and in this case, that the copy was left there with a person of mature age, during such absence.³

§ 723. If the tenant is disposed to contest the landlord's proceedings upon the return of the summons, and denies his right to take possession in this summary manner, the statute reserves to him the privilege of having his case tried either by a jury, or by the magistrate, as he may elect. Any person in possession of the demised premises, or claiming the possession thereof, may, at the time appointed in the summons for showing cause, file an affidavit with the magistrate who issued it, denying the facts upon which the summons was issued, or any of those facts, and the matters thus controverted may be tried by the magistrate; or by a jury, if either party to the proceeding shall, at the time appointed in the summons for showing cause (and before adjournment) demand a jury, and shall at the time of the demand pay the necessary costs and expenses of obtaining the jury.⁴ The denial in the defendant's affidavit must be express and positive, not circumstantial nor argumentative.⁵ But it is sufficient if it denies generally, each and

¹ *Sims v. Humphrey*, *supra*.

² *Ib.* 514, §§ 82, 83.

³ *Cameron v. McDonald*, 1 Hill, 512. Upon the receipt of such summons, the defendant, if he holds under any other person than the plaintiff mentioned in the summons, must forthwith give notice of the service upon him, to his immediate landlord, under a penalty of forfeiting the value of three years' rent of the premises occupied by him. 1 R. S. 748, § 27.

⁴ 2 R. S. 514, § 84, as amended by laws of 1849, ch. 198, § 2, and laws of 1857. An affidavit of the tenant, stating that the landlord had previously, by a similar proceeding, impleaded the tenants before a magistrate, on account of the non-payment of the same rent, and that the parties appeared, and after their proofs and allegations were heard, the magistrate gave

judgment in favor of the tenants; is not sufficient to bar the landlord's claim, as it does not show what issue, or whether any, was joined, or upon what ground the judgment proceeded. *Geisler v. Acosta*, 9 N. Y. 227. Whether a defence in such proceedings can be interposed by plea, — *Quere*. Where two tenants are jointly charged in the affidavit of the landlord, with holding over, after demand and non-payment of rent, the affidavit of one of them, that the rent had not been demanded of *him* is not sufficient to make an issue requiring the summoning of a jury. A demand of the rent of one tenant, where two hold jointly, is sufficient to authorize the proceedings. *Ib.*

⁵ *Niblo v. Post's Adm'rs*, 25 Wend. 284.

every allegation contained in the landlord's affidavit.¹ In order to form a jury, the magistrate with whom the affidavit is filed must nominate twelve reputable persons, qualified as jurors in courts of record; and issue his precept, directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the person so nominated to appear before the magistrate, at such time and place as he shall therein appoint, not more than three days from date, for the purpose of trying such matters.² It is erroneous to summon any other than the exact number of jurors directed by the statute, for summary proceedings are open to all technical objections.³ If a sufficient number of jurors do not appear, or cannot be obtained to form a jury, the magistrate may order any sheriff, constable, or marshal to summon from the by-standers, or from the county at large, so many persons qualified to serve as jurors as shall be sufficient, and return their names to the magistrate; and the persons so returned may be compelled to attend.⁴ Six of the persons summoned shall be balloted for and drawn in like manner as jurors in justices' courts; and shall be sworn by the magistrate well and truly to hear, try, and determine the matters in difference between the parties. A tenant proceeded against under this statute may, upon the trial, disprove any material fact controverted by him, but he cannot set up a title to the premises, acquired by him since the taking of his lease, in bar of the landlord's claim to be put in possession.⁵ Nor where the proceeding is under the last clause of the statute can he inquire into the regularity, or validity of the judgment on which the execution was issued.⁶ But he may show that the landlord's title has been extinguished or terminated in some way by a conveyance, or by operation of law.⁷ The affidavit

¹ *People v. Coles*, 42 Barb. 96.

² 2 R. S. 514, § 35.

³ *Farrington v. Morgan*, 20 Wend. 207. This decision was made under the statute of 1880, which required eighteen jurors to be summoned, instead of twelve.

⁴ *Laws N. Y. of 1862*, chap. 368, p. 621.

⁵ *Rowan v. Lytle*, 11 Wend. 616. An interruption of the enjoyment of a privilege conferred by a lease, by physical means adopted by the landlord, constitutes an eviction, and suspends not only the rent, but also the landlord's remedies for the recovery of possession; and where a mill, with a railroad leading to it, were

included in a lease, and the lessor, after the tenant had taken possession, tore up the rails, the court held it to be an eviction of the tenant, which barred his action for the recovery of possession on the ground of non-payment of rent. *Peck v. Hiler*, 24 Barb. 178. And it did not alter this case, that the defendant had recovered damages of the lessor for a breach of the covenant for the use of the railroad, the covenant being a continuing covenant.

⁶ *Brown v. Betts*, 18 Wend. 29.

⁷ *Nellis v. Lathrop*, 22 Wend. 121; *Buck v. Binninger*, *supra*; *Rowan v. Lytle*, *supra*.

is not to be regarded as evidence on the merits, upon the trial, but when controverted by the tenant's affidavit, stands as a pleading, and is to be proved.¹ After hearing the allegations and proof of the parties, the jurors are to be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the magistrate for that purpose, who shall be sworn to keep the jury as is usual in like cases in courts of record. If the jury cannot agree after being kept together for such time as the magistrate shall deem reasonable, he may discharge them, and nominate a new jury, and issue a new precept. If there be a default of jurors on the return of a *venire*, or, if some of them are disqualified, the justice is authorized to issue a second *venire*, until a jury appears, and is qualified.²

§ 724. Any magistrate before whom the application may be pending, may, upon the request of either party, adjourn the hearing, for the purpose of enabling the party to procure his witnesses, whenever it shall appear to be necessary, but the adjournment shall in no case exceed ten days. He may also, at the request of either party, issue his subpoena, requiring any person to appear and testify before him, or before the jury, touching the matters directed to be heard by them; and every person who, being served with such subpoena, shall, without reasonable cause, refuse or neglect to appear, or, appearing, shall refuse to answer upon oath touching the matters aforesaid, will be subject to the proceedings and penalties provided by law in similar cases. But if the magistrate refuses to adjourn, it seems the Supreme Court will not take notice of such refusal, on *certiorari*.³ After the litigation has terminated, and the officer has received the warrant authorizing him to put the landlord in possession of the premises, he proceeds to execute the same; the statute directing the officer to whom such warrant for delivering

¹ *Simpson v. Rhinelander*, *supra*. It is doubtful whether the parties can be examined as witnesses on their own behalf in this proceeding under the provisions of the New York Code, § 899, &c. See also Code, § 471; *Benjamin v. Benjamin*, 5 N. Y. 883; *Capet v. Parker*, 3 Sandf. 665; *People v. Willis*, 5 Abb. Pr. R. 242.

² *Roach v. Cosine*, 9 Wend. 280; *Porter v. The People*, 7 How. Pr. R. 441.

³ *Wilson v. Green*, 20 Wend. 180. The plaintiff in a landlord and tenant proceeding cannot, after producing a written lease, the execution of which he fails to prove, maintain his action on parol proof

of possession and payment of rent. *Barry v. Ryan*, 4 Gray, 523. In case of proceedings before a justice of the peace, he must enter the finding of the jury, or, in case no jury is called, his final decision, upon the application for the warrant, in his docket, and render judgment therefor; and include in the judgment, costs to the prosecuting party at the same rate of fees allowed in justices' courts, and limited in like manner. And in the warrant for delivery of possession or by execution, he must direct the collection of such costs. *Laws*, 1849, p. 292.

possession shall be directed and delivered, in either of the cases aforesaid, to execute the same according to the tenor thereof. If the decision of the magistrate, or the verdict of the jury so summoned, shall be in favor of the lessor or landlord, or other person claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff of the county, or to any marshal, or constable of the county in which the premises are situated, commanding him to put the landlord, lessor, or other person, into possession of the premises.¹

§ 725. The issuing of the warrant for the removal of the tenant operates as a dissolution of the relation of landlord and tenant. The statute declares, "Whenever a warrant shall be issued as aforesaid by any such magistrate, for the removal of any tenant from any demised premises, the contract or agreement for the use of the premises, if any such exists, and the relation of landlord and tenant between the parties, shall be deemed to be cancelled and annulled."² This section, however, is not intended to prevent a landlord from collecting all rent due from the tenant for the non-payment of which he was dispossessed, as well as that which accrues subsequently for actual occupation; its operation being not to annul the lease from its date, but only from the time of the default for which the warrant issued. Compensation for the use of the premises by the tenant intermediate the default and the time he is dispossessed, cannot, however, be recovered by an action on the lease; but the landlord's only remedy for this is by an action of trespass, in which he recovers a sum proportionate to the rent, as damages for the wrongful detention.³

§ 726. In either of the cases contemplated by the statute, except where the tenant holds over after the expiration of his term, provision is made for a stay of all proceedings against the tenant, upon his complying with the requisition of the law, adapted to his particular case. And the proceedings will be stayed, in any stage of the cause, upon the terms mentioned in the statute. The issuing of the warrant of removal will be stayed in the case of a proceeding for the non-payment of rent, if the person owing the rent shall,

¹ 2 R. S. 514, §§ 86-89. Rainy weather is no excuse for the delay of the officer in the execution of this writ. *Higginbotham v. Lowenbein*, 28 How. Pr. R. 221.

² 2 R. S. 515, §§ 41-48.

³ *Hinsdale v. White*, 6 Hill, 507; *Ru-*

bicum v. Williams, 1 Ashm. 235; *Hartshorne v. Watson*, 4 Bing. N. C. 178; *McKeon v. Whitney*, 3 Den. 452; *Crane v. Hardman*, 4 E. D. Smith, 339, 448; *Whitney v. Myers*, 1 Duer, 266; *Giles v. Comstock*, 4 N. Y. 270.

before such warrant be actually issued, pay the rent due, and all the costs and charges of the proceedings, or give such security as shall be satisfactory to the said magistrate, to the person entitled to such rent, for the payment thereof, and the costs aforesaid, in ten days. And in case the person giving such security shall not, within the said ten days, produce to the magistrate satisfactory evidence of the payment of the rent and costs, the warrant of removal may at any time thereafter be issued. When the application to a magistrate is founded on the fact that the tenant or lessee has taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment, the proceedings shall be stayed, if at any time before issuing the warrant for removal, the tenant or lessee, or his assignee, shall pay the costs of such proceedings as have been had, and give such security to the person entitled to the rent, for the payment thereof, as it shall become due, as shall be satisfactory to the magistrate. When the application is founded on an alleged sale by execution, of the premises occupied by the defendant in such execution, the proceedings will be stayed, if at any time before issuing the warrant of removal, the occupant shall, 1. Pay the costs of such proceedings. 2. File with the officer before whom the application is pending, an affidavit that he claims the possession of such premises by virtue of some title or right acquired after such premises were sold, or as guardian or trustee for any other; and, 3. Execute a bond to the applicant for such warrant, in such penalty, and with such sureties, as the magistrate shall approve, conditioned to pay the costs which may be recovered against him in any ejectment that may be brought by such applicant within six months, for the recovery of the possession of such premises; and to pay the value of the use and occupation of such premises, from the date of such bond, to the time such applicant shall obtain possession of the same by virtue of a recovery in such action of ejectment; and also conditioned not to commit any waste or injury to such premises during his occupation thereof.

§ 727. The statute has further guarded the rights of both the parties, by providing that nothing therein contained shall be construed to impair the rights of any landlord or lessor, or of any tenant, in any case not therein provided for.¹ By the law of 12th

¹ 2 R. S. §§ 48-51.

April, 1842, also, in proceedings under the second subdivision of the 28th section of the above statute, if the unexpired term of the lease exceeds five years at the time of issuing the warrant, the lessee, his assigns or personal representatives, may, at any time, within one year after possession of the demised premises shall have been delivered to the landlord, pay, or tender to the lessor, his representatives, or attorney, or to the officer who issued the warrant, all rent in arrear to the time of payment or tender, and all costs incurred; and in such case the premises shall be restored to the lessee, who shall hold and enjoy the same without any new lease thereof, according to the terms of the original demise; and any mortgagee of the lessee, or any part thereof, who shall not be in possession of the premises, or any judgment creditor of the lessee, who shall, within a year after the execution of the warrant, pay all rent in arrear, all costs and charges as aforesaid, and perform all the agreements of the first lessee, shall not be affected by such recovery; and such judgment creditor may file a suggestion of such payment upon the record, and issue execution for the amount of the original judgment and of such payment.

§ 728. The Supreme Court may award a *certiorari* for the purpose of examining any adjudication made on any application authorized by the statute; but the proceedings cannot be stayed or suspended by such writ of *certiorari*, or by any other writ or order of any court or officer.¹ Even a court of equity has no power to stay these proceedings, and if a tenant sustains injury or damage by being wrongfully dispossessed, he has an adequate remedy by a writ of restitution from the Supreme Court, or by an action upon the covenant for quiet enjoyment contained in the lease.² In the return to the *certiorari*, it must affirmatively appear that the statute has been strictly pursued in the proceeding before the magistrate;

¹ 2 R. S. 515, §§ 44-47; *Lynde v. Noble*, 20 Johns. 80. No one but a party interested in the subject-matter of the proceedings can have this writ. *Colden v. Betts*, 12 Wend. 284.

² *Smith v. Moffat*, 1 Barb. 65. *Wordsworth v. Lyon*, 5 How. Pr. R. 463; *Hyatt v. Burr*, 8 How. Pr. R. 168. This prohibition of the statute against injunctions only affects cases where the magistrate has jurisdiction, and not those where, by the admission of the person assuming to be landlord, he has no jurisdiction. Per Mason, J., in *James v. Stuyvesant*, 8 Sandf. 666. Nor would the statute pre-

vent a court of equity from relieving a tenant from fraud or surprise. *Ib.* *Forrester v. Wilson*, 1 Duer, 624. The *certiorari*, however, suspends the effect of the judgment of the magistrate in every thing except what remains to be done by himself; and although he may issue his warrant to dispossess the tenant, during the pendency of the *certiorari*, his judgment is no evidence that the tenancy has ceased, or of the landlord's right to re-enter; nor can the landlord maintain an action for rent accruing between the time of the forfeiture and the issuing of the warrant. *Launitz v. Dixon*, 5 Sandf. 249.

as that the officer to whom the precept for that purpose was directed, was commanded to summon eighteen reputable persons qualified to serve as jurors in courts of record, who had been nominated by the magistrate before whom the proceedings were had, or the proceedings will be quashed. It is not enough if the return states that the officer was commanded to summon a jury *as directed by the statute*.¹ Upon such *certiorari*, the Supreme Court have power to examine into the correctness of all the decisions of the officer before whom the proceedings were had, upon questions of law, and to require the return of such parts of the proceedings as are material to an examination of the case upon its merits. The authority of the court, in such case, is not limited to questions of jurisdiction and regularity, but it may affirm, reverse, or quash the proceeding, as justice may require. It will not, however, reverse the judgment as to some of the defendants, and affirm it as to the others; for, if irregular as to one, it is irregular as to all.² Whenever any such proceedings brought before the Supreme Court by *certiorari* shall be reversed or quashed, the court may award restitution to the party injured, with costs, and may make such orders and rules, and issue such process, as may be necessary to carry their judgment into effect.³ In all cases of an application pursuant to the provisions of this article, the prevailing party will recover costs, and may maintain an action for the recovery thereof, and if the proceedings shall be reversed or quashed by the Supreme Court, the tenant or lessee may recover against the person making application for such removal, any damages he may have sustained by reason of such proceeding, with costs, in an action on the case.⁴ The judgment of the Supreme Court, at a general term upon the *certiorari*, will be final, unless an appeal shall be allowed by the said court, at a general term, before the end of the term next after that at which the judgment was rendered. The appeal upon any judgment rendered upon such *certiorari*, may be brought on for argument, as a preferred cause, at any term of the Court of Appeals, by either party, upon fourteen days' notice. Laws 1868, p. 1931.

¹ Farrington v. Morgan, 20 Wend. 207.

² Anderson v. Prindle, 28 Wend. 616; Buck v. Binninger, 8 Barb. 391; Niblo v. Post's Adm'rs, 825 Wend. 280; Benjamin v. Benjamin, 5 N. Y. 883; Morewood v. Hollister, 6 id. 309; Haviland v. White,

7 How. Pr. R. 154; Geisler v. Acosta, 9 N. Y. 227.

³ The court will not, of course, award restitution to the tenant if the term has expired before judgment of reversal is rendered. Chretien v. Doney, 1 N. Y. 420.

⁴ 2 R. S. 516, §§ 48, 49.

§ 728 *a*. The proceedings before a justice of the peace may also be removed after judgment by appeal to the county court of the county, in the same manner and with the like effect, and upon the like security as appeals from the judgments of justices in civil actions; except that the decision of such county judge must be an affirmance or reversal of the judgment, and is final. But in addition to the security for the judgment required in case of an appeal, in order to stay the issuing of a warrant or execution, there must also, in case the tenant appeals, be security given to pay all rent accruing or to accrue upon the premises subsequent to the application to the justice. Nor will the appeal be allowed, unless security for the judgment shall be given and approved of by the judge, at the time of allowing the appeal, and served on the justice with the affidavit for appeal.¹

728 *b*. Another ground for the removal of a tenant from demised premises has recently been furnished by the laws of New York. These provide that when any premises are used or occupied as a bawdy house, or house of assignation for lewd persons, the owner or landlord may apply to a magistrate upon an affidavit setting forth the facts for the removal from the premises of the person or persons described in the affidavit. Whereupon the same proceedings are to take place as for the non-payment of rent, from the service of summons to the issue of the warrant for dispossession. And any owner or tenant of property in the immediate neighborhood of property so used may give written notice to the owner or landlord thereof, and require him to make such application; and if he neglects to do so for five days, the party giving the notice may proceed to make the application.²

¹ Laws, 1849, ch. 198, § 5.

² § 1. Laws of 1868, p. 1724. We have stated, *ante*, § 717 note, that the summary proceeding for landlords to recover possession, although in many States included with the statutory enactments upon forcible entry and detainer, and though a like remedy is given in either case, are yet kept generally distinct, either by the express language of the statutes, or by judicial construction even in cases where the words of the statute would seem clearly to include and apply to both processes. The proceeding given in the text is therefore substantially the same with the summary proceedings for possession by landlords in other States, however the same may be entitled, and these are so largely

governed by statute, and so generally alike in details, that only the leading features of the enactments concerning them will be given with a few decisions illustrative of doubtful or varying points.

§ 2. There seem to be four classes of cases in which landlords are entitled to have summary proceedings. First, where the tenant holds over a definite term; secondly, where a tenant at will holds after notice to quit; thirdly, where rent has not been paid, though this is not made a ground of forfeiture in the lease; and fourthly, where the lease is determined by forfeiture.

§ 3. The first of these grounds exists in Maine, Gen. Stat. 1857, c. 94; Massachusetts, Gen. Stat. 1860, c. 187; Ohio,

Rev. Stat. 1854, c. 54, §§ 125, &c.; Indiana, 2 Gavin & H. Stat. pp. 680, &c.; Illinois, Stat. 1857, vol. 1, p. 521; Kentucky, Code, § 500, &c.; Michigan, Comp. Laws, 1857, §§ 4985, &c.; Iowa, Code, §§ 2862, &c.; Missouri, Rev. Code, 1855, pp. 787, &c.; California, Comp. Laws, 1853, c. 86; New Hampshire, Gen. Stat. 1867, c. 281; Vermont, Gen. Stat. 1862, c. 46; Connecticut, Gen. Laws, 1866, tit. I, §§ 850, &c.; New Jersey, Nixon's Dig. 1861, pp. 822, 454; Pennsylvania, Purdon's Dig. 1861, p. 618; Wisconsin, Rev. Stat. 1856, c. 155; Georgia, Rev. Code, 1868, §§ 4005, &c.; and Alabama, Rev. Code, 1867, §§ 8297, &c., though in the last eight of these States process lies only after demand and notice. This in New Hampshire is seven, and in Connecticut thirty days; in Pennsylvania, three months; in Wisconsin, three days; while in Vermont, New Jersey, Georgia, and Alabama, no time is specified.

§ 4. The remedy is given in the second class of cases in all the above-mentioned States, except perhaps California, Ohio, Connecticut, and Vermont. See Stat. cited *supra*. In Michigan, Wisconsin, and New Jersey, as in New York, the process is given against tenant at sufferance only after notice. Stat. *ubi supra*. But in most States a tenant at sufferance is liable to the process at once and without notice. See *ante*, § 718 and note.

§ 5. The remedy in the third class of cases is given in New Jersey, California, and Wisconsin, after three days' notice and demand in writing; in New Hampshire, after seven; in Illinois and Indiana, ten; and in Massachusetts and Michigan, fourteen; and in Pennsylvania, after fifteen days. In Georgia, no time is limited. Stat. *ubi supra*.

§ 6. The fourth ground for this process is given in Maine, New Hampshire, and Vermont, and also in Massachusetts and Connecticut, though formerly otherwise in the two latter States. See Fifty Assoc. v. Howland, 11 Metc. 99; Du Bouchet v. Wheaton, 12 Conn. 583; but now, see Mass. Gen. Stat. 1860, c. 187, § 2; Conn. Gen. Stat. 1866, § 860; Barnum v. Keeler, 83 Conn. 209; but the lease if voidable must first be avoided by entry. Bowman v. Foot, 29 Conn. 381; Lang v. Young, 84 id. 526. While in California, Nevada, Michigan, Wisconsin, and Illinois, it is broadly enacted that the process lies upon the breach of any covenant or condition of the lease and demand for possession. Stat. *ubi supra*. So apparently in Alabama, where it lies on the "termination of the tenant's possessory interest."

§ 7. In the States first mentioned above, except Vermont, New Hampshire, and Massachusetts, the proceeding is begun,

as in New York, by a complaint, which in California, Georgia, Michigan, Illinois, New Jersey, and Maine, must be sworn to. Stat. *ubi supra*; while in Connecticut, process issues only if the complainant first gives bond for costs. *Ibid*. In the other three New England States first named, the process is begun by a writ like any other civil action. *Ibid*. The complaint serves the office of a declaration being made part of the record. Caswell v. Ward, 2 Doug. (Mich.) 874. It must, therefore, as this proceeding is not according to the course of the common law, set forth all the facts which constitute the offence, and give the court jurisdiction. Bush v. Dunham, 4 Mich. 389; Royce v. Bradburn, 2 Doug. (Mich.) 377; Bryan v. Smith, 10 Mich. 229; Ish v. Chilton, 28 Mo. 256; Shaw v. Gordon, 2 Greene (Iowa), 876; Rains v. Oshkosh, 14 Wisc. 872; Dunne v. Trustees, 89 Ill. 578. Thus besides a description of the premises and the relation of landlord and tenant between the parties, the time of the offence and complainant's right to the possession must properly appear. *Ibid*. In Vermont, New Hampshire, Massachusetts, and Michigan, however, by express provision of the statute, and perhaps in some other States by construction, the complaint or declaration need only describe the premises and aver that the defendant holds them unlawfully, and against the right of the plaintiff, and no further declaration is necessary. Stat. *ubi supra*.

§ 8. In all these States justices of the peace, or for the county alone, have jurisdiction of this proceeding, except in Michigan where a commissioner or judge of the circuit court may entertain it originally; and on complaint or writ a summons issues to the defendant to appear at an early day named to try the issue of right to the possession. Stat. *ubi supra*. The details of service and return are so generally fully provided for by the statutes, and so closely resemble those of New York, given in the text, that they do not need special mention here. *Ibid*. In Georgia, however, no trial is contemplated to be had in the court of first resort. On sworn complaint being made, a warrant issues for the removal of the tenant, who may, however, make a counter affidavit traversing the complainant's, and give a bond to the sheriff to contest the issues raised. Whereupon the cause is, as of course, removed to the higher court. *Ibid*. The issue seems to be tried, as of course, before the justice with a jury, only in Vermont, Kentucky, and Illinois; while in the other States, except in Alabama, where no jury seems to be allowed, a jury trial is had if either party so desire, though

in Connecticut only on the complainant's giving bond. *Ibid.* For the details of the trial and matters of evidence and practice therein, the reader is again referred to the statutes of the several States as above cited.

§ 9. In view of the summary character of the proceedings, and of the speedy relief intended to be given thereby, it is specifically enacted in some States, as in Alabama, Iowa, and New Jersey, that the title shall not be inquired into in this process. *Stat. ubi supra.* Unless when otherwise by statute this would seem to follow from the general estoppel of a tenant to deny his landlord's title. *Settle v. Henson, Morris*, 111. But as this rule is also subject to exception, as that tenant may show the lessor's title determined; *ante*, § 707; the above statutory enactments may prescribe a stricter rule, and preclude the tenant even from this inquiry if the relation of landlord and tenant is once shown to exist. *Townsend v. Van Aspen*, 88 Ala. 572; and the same rigid rule seems to be held in some States in the absence of specific provision by statute. *Jarvis v. Hamilton*, 16 Wisc. 574; *White v. Baily*, 14 Conn. 271. On the other hand, the statutes of several States provide for inquiry into the title in this process; though this by the express terms of the statutes of some States, and also, as the inquiry is beyond the jurisdiction of a justice of the peace necessarily at law, also it would seem, removes the cause to a higher tribunal. Thus in California and Nevada, it is enacted that if the title necessarily comes

in issue the cause shall be removed. In Massachusetts, if it comes in issue "by plea or otherwise;" or in Iowa and New Hampshire, if by plea, a like removal takes place on defendant's recognizance to pay costs and intervening rent. *Stat. ubi supra.* But even here it would seem that such inquiry into the title is to be limited by the rule of estoppel above mentioned, and that the title can in no case be further brought in question than this rule permits. This is, however, otherwise in two States. In Connecticut, the statute expressly allows the tenant to plead title acquired by himself since he became tenant, and to try this question before the justice; and in Maine, the tenant may file a brief statement of title in himself or some other under whom he claims, and the cause shall then be removed and tried on this issue in the higher court upon his giving bond to pay costs and intervening rent. *Ibid.* *Rodgers v. Palmer*, 83 Conn. 155; *Abbott v. Norton*, 58 Me. 158.

§ 10. In all the States, however, except Georgia, Ohio, and New Jersey, and perhaps a few others, an appeal is allowed to a higher court upon the appellant's giving bond or recognizance for costs and intervening rent. This was also the case in New Jersey, under the statutes of 1861, but by statute of 1864, appeal and removal by *certiorari* were both excluded; while in Georgia, as no trial takes place before the justice, no appeal of course exists. In Ohio, the only mode of removal is by exception taken to the ruling of the court on the law or evidence. *Stat. ubi supra.*

CHAPTER XV.

THE TENANT'S REMEDIES.

SECTION I.

ACTIONS FOR A WRONGFUL OR IRREGULAR DISTRESS.

§ 729. We now proceed to speak of the remedies, which more appropriately belong to the tenant, and by means of which the law redresses such wrongs as he may suffer, at the hands of an unjust or inconsiderate landlord. For, if a landlord takes a wrongful distress, that is, a distress where no rent is due, or not so much as is distrained for; or if, though rent be due at the time of the seizure, a tender of the amount is made before the goods are impounded; or, if he takes goods which are not by law subject to distress; or, if he distrains irregularly, that is, where the distress itself is legal, but some of the proceedings thereon are not in conformity with the statutes by which they are regulated; or, if he takes things privileged from distress, as by severing fixtures from the freehold, or takes beasts of the plough, while other things remain on the premises sufficient to satisfy the distress, the tenant may either rescue them before they are impounded, or maintain an action against the landlord suited to the exigency of the case, and according to the nature of the grievance. The action of replevin is the usual remedy the law gives, for a return of goods wrongfully taken, but for the abuse of a distress, trespass or case is the appropriate remedy.¹

§ 730. The ancient statute of Marlebridge (52 Hen. III. c. 4), which forms the basis of all subsequent legislation on this subject, both in England and America, enacts, "distresses shall be reason-

¹ *Connah v. Hale*, 28 Wend. 462; *Perrean v. Bevan*, 5 B. & C. 284; *Mounson v. Redshaw*, 1 Wms. Saund. 195, n.; *Dalton v. Whitem*, 1 Car. & K. 961; *Co. Lit.* 160, b.; *Harrison v. Barnly*, 5 T. R. 248.

able, and not too great; and they that take unreasonable and undue distresses shall be grievously amerced, for the excess of such distress." The remedy for a party aggrieved under this statute is by an action on the case, and not trover or trespass.¹ To enable a party to maintain an action for taking an unreasonable or excessive distress, it is not necessary that express malice should be shown; it is sufficient if the goods taken appear to be greatly disproportionate to the amount of rent due. But it is not every trifling excess that will render the landlord liable to this action; for where there is but one thing on the premises which can be taken, so that the landlord must either take it or go without his distress, an action will not lie, although the value of the thing taken greatly exceed the amount of rent due.²

§ 731. Nor is it necessary that the proceedings should have gone further than a levy under a distress warrant, in order to fix the landlord's liability; for where a landlord's agent went upon the premises of the tenant, walked around them, and gave the usual written notice that he had distrained certain goods lying there, for rent, &c., and then went away without leaving any person in possession, it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving a person in possession was not an abandonment of the distress.³ If the landlord distrains after the tenant has tendered the rent, without making a subsequent demand of it, and being refused by the tenant, an action may still be maintained for an excessive distress.⁴ And in such action the tenant will not be required to prove the precise amount due.⁵ Nor does the tenant waive his right of action by entering into an arrangement with the landlord respecting the sale of the goods seized.⁶ But where the tender is not made until after the distress has been impounded, case will not lie for the detainer,⁷ nor can an action for an excessive distress be maintained after a judgment recovered in replevin.⁸ Even a lodger may maintain an action if his goods are taken on an excessive distress, by the landlord of the party under whom he occupies.⁹ The right of action, however, for taking an

¹ *Hutchins v. Chambers*, 1 Burr. 539; *Whitworth v. Smith*, 1 Mood. & R. 198.

² *Field v. Mitchell*, 6 Esp. 71; *Willoughby v. Backhouse*, 2 B. & C. 823.

³ *Swann v. Falmouth*, 8 B. & C. 456; *Bayliss v. Fisher*, 7 Bing. 158.

⁴ *Branscomb v. Bridges*, 1 B. & C. 145.

⁵ *Sells v. Hoare*, 1 Bing. 401.

⁶ *Willoughby v. Backhouse*, *supra*.

⁷ *Sheriff v. James*, 1 Bing. 841.

⁸ *Phillips v. Berryman*, Johns. N. P. Trespass, IX.

⁹ *Fisher v. Algar*, 2 C. & P. 374.

excessive distress, is said to be strictly personal, and does not pass to assignees, or personal representatives.¹

§ 732. Trespass was the tenant's usual remedy at common law, if the landlord distrained where no rent was due. The statute 2 Wm. & Mary, c. 5, which first enabled a landlord to sell a distress that had been seized for rent, provided, that if any person should distrain and sell under that act for any rent pretended to be due, when in fact no rent was due, the owner of the goods might recover double the value of the goods so distrained and sold. This statute does not apply to the case of distraining for more rent than is due, or where there is no right to distrain, but only where no rent is due. If there is any rent due, it will protect the distrainor from the penalty of paying double the value of the goods, although he may be liable in another way if he proceeds without authority.² It is to be observed, also, that the statute extends only to cases where the goods distrained have been sold; if they have not been sold, the remedy is by an ordinary action of trespass for damages, as at common law.³

§ 733. At common law, a landlord cannot distrain twice for the same rent; nor can he distrain for part of the rent at one time and part at another, if there were sufficient goods upon the premises, at the time of the first distress, to have enabled him to have then distrained for the whole. If he does either he is liable to the tenant for damages, either in trespass or case, at the tenant's option.⁴ So if, after having distrained goods sufficient to pay the rent, he abandons that distress, and afterwards make a second distress for the same rent, he is also liable for damages in either form of action.⁵ If, however, he distrains for the entire rent, but by mistake in the value of the goods distrained takes an insufficient distress, a second distress for such insufficiency will be lawful, although there might have been sufficient goods upon the premises to have answered the whole demand at the time of the first taking. And he may take a second distress upon goods subsequently coming upon the premises, if, in the first instance, he distrained all the goods he could then find thereon for the entire rent, and the goods did not cover the amount of the rent due.⁶

¹ O'Donnell v. Seybert, 18 S. & R. 54; Smith v. Meanor, 16 *id.* 875.

² Peters v. Newkirk, 6 Cow. 108.

³ Lockier v. Paterson, 1 Car. & K. 271.

⁴ Lear v. Caldecott, 4 Q. B. 128.

⁵ Smith v. Goodwin, 4 B. & Ad. 418.

⁶ Bro. Abr. Distress, 96; Hutchins v. Chambers, 1 Burr. 589; Horsford v. Webster, 1 Cr. M. & R. 696.

§ 734. If rent is due at several days, the taking of a distress on one day for rent will be no bar to the taking of another rent on another day ; nor does it matter whether the first distress be taken for the rent which last became due.¹ And where cattle, taken and impounded as a distress, die, without any fault or neglect in the distrainor, he may lawfully take another distress.² Where a landlord has distrained for rent, and the tenant, in order to prevent a sale, has given a promissory note for the arrears then due, in which note a third person has joined as security ; should the landlord again distrain for rent accruing after the period to which the note referred, and the proceeds of such second distress are not sufficient to satisfy both the demand in respect of the promissory note, and also the rent subsequently accrued, they must first be applied in discharge of the note, or rather of the debt for which the note was given ; since while the note remains unpaid it was merely a collateral security, not affecting the landlord's right of distress.³

§ 735. Case lies at common law, for distraining for more rent than was due, even though the distress taken was not sufficient to pay the rent due ; for though there is in such case no real damage, there is legal damage ; and the action lies, though the notice of distress for more rent than is due is withdrawn, and the distress is sold, under a second notice, for the rent really due. Nor will the relinquishment of the excessive sum distrained for cure the wrong, any more than the return of a chattel converted cures the conversion.⁴ If a landlord take things which are by law exempt from distress, the tenant, or person from whose possession they were taken, or the owner, if he have a right to the immediate possession, may maintain either trover, trespass, or replevin against the party distraining ; or the landlord, if he can be connected with the distress ; or both. If the things have been removed and sold, the plaintiff will be entitled to their value, and the damage he has sustained by their removal. But if they have not been removed, and the tenant has paid the rent and expenses, to prevent their removal, he will only be entitled to the actual damage sustained by the seizure.⁵

¹ *Pamer v. Stabick*, 1 Sid. 44.

² *Vasper v. Eddowes*, Ld. Ray. 719 ;
Vinkestone v. Ebdon, 1 Salk. 248.

³ *Heming v. Emuss*, 1 Price, 386.

⁴ *Taylor v. Henniker*, 12 Ad. & E.

488, overruling *Wilkinson v. Terry*, 1
Mood. & R. 377.

⁵ *Harvey v. Pocock*, 11 M. & W. 740 ;
Niblet v. Smith, 4 T. R. 504.

§ 736. We have seen that, at common law, any irregularity or unlawful act in taking a distress, made the landlord a trespasser from the beginning, and a tenant might proceed against him accordingly : but that the statute now only authorizes the party aggrieved to maintain an action of trespass, or trespass on the case, for any special damage he may have sustained, by such irregularity, or unlawful act. An irregularity consists in either omitting to do something necessary, for the due and orderly conducting a legal proceeding, or doing it in an unseasonable time, or improper manner. The nature of the irregularity must determine the form of action, except where, by virtue of a statute, as in New York, case may be a concurrent remedy with trespass, under any circumstances. Hence for an irregularity, consisting in the omission to appraise the goods, before they were sold, the action will be on the case. But where the party remained in possession of the goods in the plaintiff's house beyond five days, and then removed them, it was held that trespass was maintainable ; since the removal of the goods was a distinct, subsequent, and substantive act of trespass, and the remaining in possession beyond the five days was also to be considered a new act of trespass ;¹ Lord Ellenborough observing, that he could not understand the statute as giving an option to maintain trespass, where trespass would not lie by the rules of the common law ; but as giving an election to bring trespass where trespass was the proper remedy, and case only where case was proper.

§ 737. Nor is it every mere irregularity, that will subject a landlord to an action for damages ; for where a landlord distrained furniture and beasts of the plough, and by the appraisement it appeared that, without the beasts of the plough, the distress would be insufficient to satisfy the rent ; but upon the sale the beasts were first sold, and then part of the furniture, and it was ascertained, by the result of the sale, that the furniture alone would have satisfied the rent : the tenant brought an action on the case, under the statute prohibiting beasts of the plough to be distrained, so long as other goods were to be found on the premises ; and the judge left it to the jury to say whether the defendant had reasonable grounds for supposing that the goods were sufficient to satisfy the rent and expenses, without a sale of the beasts ; for that if the original tak-

¹ *Winterbourne v. Morgan*, 11 East, 895 ; *Messing v. Kemble*, 2 Camp. 115 ; *Ladd v. Thomas*, 12 Ad. & E. 117.

ing was lawful, the result of the sale could not make it unlawful, and there was nothing in the statute directing beasts of the plough to be last disposed of.¹

§ 738. Where a tenant underlets, the law implies a duty on his part to indemnify the under-tenant against all his covenants with the superior landlord; and the under-tenant may have an action on the case against him for any injury he may sustain, by reason of any such breach of covenant.² But where the underletting was by deed, not containing a covenant to indemnify against such claims of the head landlord, the under-tenant was not allowed to maintain assumpsit against his landlord, for permitting him to be distrained upon for rent due to the head landlord; the lease being by deed, the tenant's remedy, if any, was by an action of covenant upon the implied covenant for quiet enjoyment.³ But where the demise is not by deed, the proper remedy is by action on the case, although assumpsit may also lie.⁴

SECTION II.

THE ACTION OF REPLEVIN.

§ 739. As a common-law action, replevin has long been used to try the legality of a distress;⁵ although it is not now confined exclusively to this object (except in Connecticut and Alabama),⁶ but applies to all cases where goods and chattels have been wrongfully taken, whether under a distress or otherwise.⁷ And in general it lies for any tortious or unlawful taking of the property of another, or whenever trespass *de bonis asportatis* can be sustained.⁸ When goods have been tortiously taken, even a *bonâ fide* purchaser under the wrong-doer is answerable to the owner, either in trover

¹ Jenner v. Yolland, 6 Price, 4.

² Hancock v. Caffyn, 8 Bing. 358.

³ Schlenker v. Moxsy, 8 B. & C. 789; Baber v. Harris, 9 Ad. & E. 582.

⁴ Per Tindal, J., in Hancock v. Caffyn, *supra*.

⁵ 2 Inst. 140; Wilson v. Hobday, 4 Maule & S. 121.

⁶ Watson v. Watson, 9 Conn. 140; Smith v. Crockett, Minor, 277.

⁷ Pangburn v. Patridge, 7 Johna. 140; Hsley v. Stubbs, 5 Mass. 283; *Ex parte* Chamberlin, 1 Sch. & L. 320; Weaver v.

Lawrence, 1 Dall. 156; Keite v. Kennedy, 16 S. & R. 900; Vaiden v. Bell, 8 Rand. 448; Byrd v. O'Hanlin, 1 Const. 401; Clark v. Adair, 8 Harringt. 113; Pease v. Simpson, 8 Fairf. 261; Chinn v. Russell, 2 Blackf. 174; Stat. of Ohio, 1831.

⁸ Wheeler v. McFarland, 10 Wend. 822-849; Rogers v. Arnold, 12 Wend. 82; Hopkins v. Hopkins, 10 Johna. 869; Thompson v. Button, 14 id. 87; Buffington v. Gerrish, 15 Mass. 156; Badger v. Phinney, *ib.* 859; Stoughton v. Rappalo, 8 S. & R. 562.

or replevin in the *detinet* as well as in the *cepit*.¹ But not for an illegal detention of property, where the party comes to the possession by delivery, from a person having a special property only;² nor for goods deposited with the plaintiff by a stranger, who has no interest in them.³ The courts of Maine and Massachusetts have held, and the statutes of New Jersey and Indiana enact, that it lies in any case of unlawful detention, though the taking was not tortious or unlawful.⁴ So it lies in Pennsylvania, wherever one man claims goods in the possession of another, no matter how the possession of the latter was acquired.⁵ While in Virginia it was decided that, at common law, replevin lay in all cases where goods were unlawfully taken.⁶ And this was the law of Virginia until 1823, when an act of the legislature confined the writ to cases of distress for rent.⁷ In South Carolina it is said not to have been decided whether replevin will lie in any other case than that of a distress for rent.⁸ While the statutes of New York, Michigan, Illinois, Missouri, and Arkansas apply this writ to all cases of wrongful taking or detention.

§ 740. In executing the writ, the sheriff of the county in which the goods have been distrained will take them out of the hands of the landlord and his distraining officer, and replace them in the possession of the tenant, upon receiving from the tenant his bond, with sufficient sureties, in a sum double the value of the property seized; conditioned that he will prosecute his suit with effect, and without delay, and test the validity of the distress; and that he will restore the goods to the landlord, in case the judgment of the court shall be against the tenant. At common law, the sheriff took pledges from the plaintiff to prosecute the suit; and, by statute, he was required also to take pledges for a return of the beasts, if return should be awarded; but this he did at his peril, and if the security proved insufficient, he remained liable to an action on the case.⁹ Where this liability exists, it is co-extensive with that

¹ Bennett v. Warren, 8 Hill, 348; Pierce v. Van Dyke, 6 id. 613; Patterson v. Adams, 7 id. 126.

² Marshall v. Davis, 1 Wend. 109; Galloway v. Bird, 4 Bing. 299.

³ Harrison v. McIntosh, 1 Johns. 380.

⁴ Seaver v. Dingley, 4 Greenl. 315; Marston v. Baldwin, 17 Mass. 606; Baker v. Fales, 16 id. 147; Ehner, Dig. 486.

⁵ Weaver v. Lawrence, 1 Dall. 156; Keite v. Boyd, 16 S. & R. 300.

⁶ Vaiden v. Bell, 3 Rand. 448.

⁷ 1 Robinson, Pr. 408.

⁸ Byrd v. O'Hanlin, 1 Const. 401.

⁹ Ferreau v. Bevan, 5 B. & C. 284.

The plaintiff must give some evidence of the insufficiency of the sureties, in order to throw the burden of proof to the contrary on the sheriff. Roscoe, N. P. 648; Gwyllim v. Scholey, 6 Esp. 100; Rex v. Lewis, 2 T. R. 617; 11 Geo. II. c. 19; Richards v. Acton, 2 W. Bl. 1220.

which the sureties would have been under, if the sheriff had done his duty, and taken a sufficient bond; and as the responsibility of the sureties is limited by the statute to double the value of the goods distrained, that sum is the measure of damages against the sheriff.¹ In Pennsylvania, the sheriff is still held responsible for the sufficiency of the sureties, at the termination of the suit, and it is no excuse for him that they were in good credit at the time the writ of replevin was executed.²

§ 741. The Code of Procedure of New York has made a material change in the law of replevin, with respect to the possession of property seized; for if the defendant will give equal security to that which the plaintiff has given, he will, under the code, be allowed to retain the property during the litigation. It provides, "At any time before the delivery of the property to the plaintiff, the defendant may require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum, as may, for any cause, be recovered against the defendant. The defendant's sureties, upon a notice to the plaintiff, of not less than four nor more than eight days, shall justify before a judge, in the same manner as the sureties given by the plaintiff; and upon such justification, the sheriff shall deliver the property to the defendant."³

§ 742. The sheriff is not bound to warrant the sufficiency of the pledges at all events; for if, at the time of taking the bond, the sureties are apparently responsible, he is not liable to an action for taking insufficient pledges.⁴ But he is bound to use a reasonable discretion and caution, and whether he has done so or not is a question for a jury.⁵ And although he is justified in taking a person as surety, who appears to the world, and is reputed to be a person of responsibility, yet, if he actually knows that such person is not responsible, or if, having the means of information, he neglects to use them, he will be responsible.⁶ Although he is required by the

¹ *Evans v. Brander*, 2 H. Bl. 547; *Heford v. Alger*, 1 Taunt. 218; *Baker v. Garratt*, 8 Bing. 56; *Jeffery v. Bastard*, 4 Ad. & E. 823.

² *Oxley v. Cowperthwaite*, 1 Dall. 349; *Pearce v. Humphreys*, 14 S. & R. 23.

³ Code of Procedure, §§ 211, 212.

⁴ *Hindle v. Blades*, 5 Taunt. 225; *Sutton v. Waite*, 8 Moore, 27.

⁵ *Jeffery v. Bastard*, *supra*.

⁶ *Scott v. Waithman*, 8 Stark. 170.

statute to take a bond, yet if he neglects to do so, it is no contempt of court, for which an attachment will be granted, but the proper remedy is by action on the case against him.¹ And where a statute does not require the sheriff to take a bond from the plaintiff, this omission to take such bond with sureties does not invalidate the writ, but only subjects the sheriff to an action by the defendant.² Under the statute of Massachusetts, which requires a bond from the plaintiff to the defendant, it has been held that a bond from the plaintiff to the replevying officer, instead of the defendant, was absolutely void.³ In an action against the sheriff, the sureties in the bond may be witnesses to prove whether they were sufficient or not. And if the avowant, or person making cognizance, take an assignment of the replevin bond, and prosecute the principal and sureties, and they are found to be insolvent or insufficient, he may afterwards bring an action upon the case against the sheriff for taking insufficient sureties; for taking an assignment of the replevin bond from the sheriff is no waiver of any proceedings afterwards against him, as it is in the case of a bail bond. Nor does the plaintiff waive his remedy against the sureties by giving time to the principal.⁴

§ 743. A plaintiff in replevin, who does not use diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined; but he is not responsible for the default of the sheriff, or guilty of delay, by reason of the sheriff having neglected to serve a summons.⁵ Allowing two years to elapse without proceedings has been held to be a breach of the condition to prosecute without delay, and the obligee may recover on such breach, although no judgment of *non pros.* was ever signed.⁶ To prosecute the suit *with effect* means that the plaintiff must not only proceed to a decision of the cause, but that he succeed in it also.⁷ But it has been held, that the condition of the bond was saved, when the obligor prosecuted it, until the writ abated by the death of the defendant.⁸ In Pennsylvania,

¹ *Rex v. Lewis*, *supra*.

² *Vaiden v. Bell*, 8 Rand. 448.

³ *Purple v. Purple*, 5 Pick. 226.

⁴ *Mounson v. Redshaw*, 1 Wms. Saund. 195, g. n; *Moore v. Bowmaker*, 8 Taunt. 379; *Turnor v. Turner*, 2 Brod. & B. 112.

⁵ *Harrison v. Wardle*, 5 B. & Ad. 146.

⁶ *Axford v. Perrett*, 4 Bing. 586; s. c.

¹ *Moore & P.* 470; *Gwyllim v. Holbrook*, 1 B. & P. 410.

⁷ *Gould v. Warner*, 8 Wend. 54; *Pemble v. Clifford*, 3 McCord, 43; *Morgan v. Griffith*, 7 Mod. 380; *Perreau v. Bevan*, 5 B. & C. 300.

⁸ *Badlam v. Tucker*, 1 Pick. 284.

however, this action does not abate by the death of the defendant;¹ nor, in Maryland, by the death of the plaintiff.²

§ 744. In New York, it is held that the death of the plaintiff abates the suit, and that it cannot be revived by a *scire facias*; nor has the plaintiff any remedy in such case upon the replevin bond. But the temporary right of possession which the plaintiff had acquired by his writ falls with it, and the defendant may retake the goods peaceably, without suit, or after demand and refusal, by a suit in trover or replevin.³ Where the property taken by the writ is a living animal, and there is judgment for its return, in an action on the replevin bond for a breach of its condition, it is a good plea that before judgment in the replevin suit, the animal died without the default of the plaintiff in the suit.⁴ But in Kentucky, it was held in the case of a slave replevied, that his death pending the suit was not a valid defence on the replevin bond, and, if available at all, it could only be by a plea *puis darrein continuance*.⁵ Both the avowant and the person making cognizance may take an assignment of a replevin bond from the sheriff, and sue jointly upon it.⁶ The avowant may always sue, without joining the person making cognizance;⁷ and where there is no avowant named on the record, the person making cognizance may sue alone on the bond.⁸

§ 745. The sureties in a replevin bond are only liable for the value of the goods seized and the costs; and if that value exceeds the amount of rent due, they will only be liable for the rent and costs, not exceeding the penalty of the bond in any case.⁹ Their liability is limited also to the amount of rent in arrear at the time of the distress and costs, excluding subsequently accruing rent.¹⁰ If the parties to the suit, without the privity of the sureties, refer the cause to an arbitrator, and agree that the bond shall stand as security for the performance of the award, it will discharge the sureties.¹¹ But where such parties referred to arbitration the time

¹ Keite v. Boyd, 16 S. & R. 300.

² Fister v. Beall, 1 Har. & J. 31.

³ Burkle v. Luce, 6 Hill, 558; Bradyll v. Ball, 1 Bro. Ch. 427; Woglam v. Cowperthwaite, 2 Dall. 68; Frey v. Leeper, *ib.* 131; Badlam v. Tucker, *supra*; Merritt v. Lumbert, 8 Greenl. 128. As to third persons, however, who have acquired rights under the plaintiff in replevin during the pendency of the suit, the court in the New York case, seems to doubt whether the defendant's lien was not gone, so that he could not retake the goods.

⁴ Carpenter v. Stevens, 12 Wend. 589.

⁵ Gentry v. Barnett, 6 T. B. Monr. 116.

⁶ Phillips v. Price, 3 Maule & S. 180.

⁷ Archer v. Dudley, 1 B. & P. 381, n.

⁸ Page v. Eamer, 1 B. & P. 378.

⁹ Hunt v. Round, 2 Dowl. Pr. R. 558; Miers v. Lockwood, 9 *id.* 975; Bowser v. Lloyd, *ib.* 1029; Hefford v. Alger, 1 Taunt. 218.

¹⁰ Ward v. Hawley, 1 Younge & J. 285.

¹¹ Archer v. Hale, 4 Bing. 464.

of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them when awarded for the rent; and agreed to suspend the proceedings in replevin pending the reference; after an award made, it was held, that the sureties in the replevin bond were not thereby discharged.¹ And it is no plea to an action against sureties, that the replevin suit was referred to an arbitrator, and that he, without the knowledge of the sureties, enlarged the time for making his award.² An agreement which was made a rule of court between the plaintiff and the principal, to stay all proceedings in replevin, upon payment by the latter of a certain sum of money, each party to pay his own costs, was held not to be a discharge to the surety, after breach by the principal; but that the surety was liable for such sum, as appeared upon a reference to be due.³

§ 746. The sheriff is bound to deliver actual possession of the chattels to the plaintiff; a symbolical delivery is not sufficient, unless with the consent of the plaintiff.⁴ At common law, he may not break an enclosure to come at the property; but by the statutes, if the property to be replevied, or any part thereof be secured or concealed in any dwelling-house, or other building or enclosure, the officer must publicly demand deliverance thereof, and if the same is not delivered, he shall cause such house, building, or enclosure to be broken open, and shall make replevin according to the writ, and, if necessary, he may take to his assistance the power of the county.⁵ After the execution of the writ by the delivery of the goods to the defendant, he cannot regain possession of them except by virtue of a judgment in the cause, and a writ of replevin issued by a defendant to obtain a redelivery of the property taken from him by virtue of a replevin is irregular, and will be *superseded* with costs, if the motion be made before the return of the writ, or *set aside* if after the return.⁶

§ 747. By the English law, if the defendant claims property in the goods, the sheriff's power to redeliver them is suspended, and the plaintiff must sue out a writ of proving property. If on the inquest the property is found for the plaintiff, the sheriff makes deliverance; but if found for the defendant, the replevin by plain-

¹ Moore v. Bowmaker, 7 Taunt. 97;
s. c. 7 Price, 228.

² Aldridge v. Harper, 10 Bing. 118.

³ Hallett v. Mountstephen, 2 Dowl. &
R. 843.

⁴ Hayes v. Lusby, 5 Har. & J. 485;
McColgan v. Huston, 2 Nott & McC. 444.

⁵ 2 R. S. 524, § 10.

⁶ Morris v. Dewitt, 5 Wend. 71.

tiff is determined, and the sheriff can proceed no further, although he may still bring a new replevin by original writ.¹ According to the practice of Pennsylvania, if the defendant claims property, the writ is not defeated, but the suit goes on, and the plaintiff gives security to deliver the goods to the defendant, if, on the trial, the property shall not be found in him.² The Revised Statutes of New York contain a provision of a similar character. If the defendant, or any other person who may be in possession of the goods and chattels specified in the writ, shall claim property therein, or any part thereof, the sheriff shall summon a jury to try the validity of the claim. If the jury shall find the property of the goods is not in the person claiming, the sheriff shall forthwith deliver them to the plaintiff; but, if the property is found to be in the claimant, the sheriff shall not deliver the same, unless the plaintiff in replevin shall indemnify the sheriff to his satisfaction for delivering the property claimed, and refund the costs, and the sheriff may then deliver the goods to the plaintiff. And if the goods are not delivered to the plaintiff, he may proceed in the action for the recovery thereof, or their value.³

§ 748. It is said to be a general rule, but subject to exception, that whatever is distrainable may be replevied.⁴ It can only be supported for taking a personal chattel, and not for things affixed to the freehold; in which latter case the remedy should be trespass; or if the interest be in the reversion, case. But if after they are levied on they be separated from the freehold, they become personal property, and may be replevied.⁵ Upon this principle, replevin lies for the detention of the young of animals distrained, which have been born since the distress.⁶ If trees are cut down upon the plaintiff's land, and converted by the defendant into posts and rails, it is not such an alteration of the property as will prevent the plaintiff from recovering them in this action.⁷ Replevin, however, will not lie for goods which the defendant has lawfully obtained possession of, until after a demand, for it is only from the time of a demand and refusal, that the detention becomes unlawful.⁸ And, therefore, furniture leased for a time unexpired, and attached as the property of the lessee, cannot be replevied

¹ 1 Inst. 145 b.

² *Weaver v. Lawrence*, 1 Dall. 156.

³ 2 R. S. 525, §§ 18-19.

⁴ 1 Swanst. 296; Bac. Ab. Rapl. F.

⁵ *Cresson v. Stout*, 17 Johns. 116;

Niblet v. Smith, 4 T. R. 504; F. N. B. 68.

⁶ Sid. 82; Gilb. on Rep. 156.

⁷ *Snyder v. Vaux*, 2 Rawle, 423.

⁸ *Seaver v. Dingley*, 4 Greenl. 316.

by the owner pending the lease, as he has no right of possession.¹

§ 749. The plaintiff must, at the time of the caption, have had either the general ownership, or a special property, as the factor, agent, or bailee of the goods taken.² A mere possessory right is not sufficient.³ Thus a deposit by a person, who has himself no property in the goods, does not give the depositary any right to replevy them; and it seems doubtful whether any other mere naked bailee for safe-keeping can maintain this action.⁴ A servant who has had charge of goods, as such only, cannot replevy; but if they were delivered to him by the master for a particular purpose, he may.⁵ It will not lie by a person out of possession of land, to recover a crop of grain cut and removed by the party in possession, although the grain was sowed by the plaintiff, and he was wrongfully ousted by the defendant; for the proper remedy is by an action of trespass, *quare clausum fregit*, after regaining possession by ejectment.⁶ Several persons, having separate interests in the property distrained, cannot join in this action;⁷ but joint tenants and tenants in common must join.⁸ And as a part-owner of a chattel cannot maintain replevin for his undivided part,⁹ if he sues for a moiety only the court will, *ex officio*, abate his writ.¹⁰ If the cattle of a *feme sole* be taken, and she afterwards marries, the action should be in the name of the husband; for the property, being personal, is transferred by the marriage, and vests in him alone;¹¹ yet the husband and wife may join when a sufficient cause for joining the wife appears.¹² If, however, the goods are taken after marriage, husband and wife ought not to join; but if they do, and after verdict a motion is made on this ground, in arrest of judgment, it will be presumed that the husband and wife were jointly possessed of the goods before marriage, and that the

¹ *Wheeler v. Train*, 3 Pick. 255.

² *Dunham v. Wyckoff*, 8 Wend. 280; Co. Lit. 145, b; *Waterman v. Robinson*, 5 Mass. 308; *Perley v. Foster*, 9 id. 112.

³ *Pattison v. Adams*, 7 Hill, 126; *Templeman v. Smith*, 10 Mod. 25; *Wyman v. Dorr*, 3 Greenl. 183; *Wheeler v. Train*, *supra*; *Smith v. Williamson*, 1 Har. & J. 147.

⁴ *Harrison v. McIntosh*, 1 Johns. 380; *Hall v. Tuttle*, 2 Wend. 475.

⁵ *Harris v. Smith*, 3 S. & R. 20.

⁶ *Demott v. Hageman*, 3 Cow. 220; *Brown v. Caldwell*, 10 S. & R. 114; *Ma-*

ther v. Trinity Church, 8 id. 509; *Kerley v. Hume*, 3 T. B. Monr. 182.

⁷ *Hart v. Fitzgerald*, 2 Mass. 509; *Gardner v. Dutch*, 9 id. 427.

⁸ *Buller N. P.* 53; Co. Lit. 145, b.

⁹ *Hart v. Fitzgerald*, *supra*; *Gardner v. Dutch*, *supra*.

¹⁰ *Per Story, J., D'Wolf v. Harris*, 4 Mason, 515.

¹¹ *Baker v. Fales*, 16 Mass. 149; *F. N. B.* 69, R.

¹² *Serres v. Dodd*, 5 B. & P. 405. If the wife's interest does not appear, the declaration is demurrable.

goods were taken before marriage, in which case the husband and wife might join.¹ Executors may replevy goods of the testator taken in his lifetime; for the general property is in the executor, and the possession ought to follow.² But if the plaintiff has not the immediate right of possession, this is not the proper action; he must proceed by action on the case.³ Nor can one joint owner of a chattel maintain this action against the other.⁴

§ 750. This action lies against a landlord who takes goods which are privileged by law, as things protected for the sake of trade, or beasts of the plough, while other things remain on the premises sufficient to satisfy the distress.⁵ Or if he takes the goods of the tenant when there is no rent in arrear; or though the rent be due at the time of the seizure, if he afterwards tender the amount due; for a tender takes away the right to distrain, until a subsequent demand and refusal.⁶ And if the goods are taken by one, at the command of another, the action may be brought against both, or either.⁷ It lies not only against the person by whose direction the distress was levied, but also against him in whose custody it is found.⁸ But since the Revised Statutes, a landlord is not liable for the unlawful execution of a distress warrant, unless he adopts and claims to avail himself of the officer's acts. And, to constitute a tortious taking, it is not necessary that there should be an actual manucaption of the goods; a mere claim of dominion, or an intimation of an intention to interfere with the goods, under pretence of any right or authority, amounts to a constructive trespass, and no demand is necessary before bringing an action.⁹ The tenant may replevy at any time before the goods distrained have been actually sold.¹⁰ And the court will, at any time, stay all proceedings in replevin, on a distress for rent in arrear, on the application of the tenant, upon payment of the rent due, according to the defendant's avowry and of all costs up to the time of the application; ¹¹ and this course is very frequently adopted, for the purpose of gaining time, and preventing a sacrifice of goods, by tenants

¹ *Berne v. Mattaire*, Ca. Temp. Hardw. 119.

² Bro. Abr. tit. Repl. pl. 56; Bul. N. P. 54; 2 R. S. 522, § 2.

³ *Gordon v. Harper*, 7 T. R. 9.

⁴ *McElderry v. Flanagan*, 1 Har. & G. 808.

⁵ Co. Lit. 160, b.

⁶ *Slingerland v. Morse*, 8 Johns. 476; *Huntley v. Le Conte*, 6 Cow. 728.

⁷ 2 Rol. Abr. 431; *Watson, Sheriff*, 297.

⁸ *Allen v. Crary*, 10 Wend. 349; *Flewster v. Royle*, 1 Camp. 187.

⁹ *Connah v. Hale*, 23 Wend. 462; *Reynolds v. Shuler*, 5 Cow. 326; *Wintringham v. Lafoy*, 7 id. 785.

¹⁰ *Jacob v. King*, 5 Taunt. 451.

¹¹ *Vernon v. Wynne*, 1 H. Bl. 24.

who have been unfortunately prevented from discharging their rent in time to avoid a distress by the landlord.

§ 751. At common law this action is strictly local, although brought for a cause of action for which trespass *de bonis asportatis* would lie, and the venue must be laid in the county in which the distress was taken; or, if it was taken in one county and carried into another, the venue may be laid in either.¹ The Revised Statutes, however, place it among transitory actions; but declare that, when this action is brought for the recovery of goods or chattels distrained for any cause, it shall be laid in the county in which the distress was *made*, and not elsewhere.² The plaintiff, also, is bound to show the place where the distress was taken, or at least a place in which the landlord has had it in custody;³ but an omission of this character may be cured by the defendant's pleading over.⁴ The declaration must conform to the writ; and where the writ is for the *taking* and *detention* of property, the plaintiff cannot declare for the wrongful detention alone.⁵ The goods taken must be described with certainty, although in this respect the same strictness does not prevail as formerly.⁶ But an allegation of taking *divers goods and chattels of the plaintiff*, without specifying them, is bad for uncertainty; and though a judgment pass by default for the plaintiff, the defect is not obviated.⁷ The nature and quantity of the goods must be described with such certainty, that the sheriff may be able to make redelivery of them, though the tenant will not be bound to prove the exact quantity, but may recover less than the declaration alleges.⁸

§ 752. To the declaration, the defendant either *pleads* in bar or abatement, or makes *cognizance* or *avowry*. And at common law a landlord, or other person interested in the premises, if not made a defendant, or a lessee for life or years, where the defendant avowed upon the title, might *pray in aid* of his lessor, that he be called in to defend and be made a party to the suit. This proceeding has been abolished in many of the States; but to provide for those cases in which the reversioner or remainder-man may desire to come in and defend, the practice which prevails in ejectment has been adopted

¹ Williams v. Welch, 5 Wend. 290; F. N. B. 29, 1; Robinson v. Mead, 7 Mass. 353.

² 2 R. S. 522, § 8.

³ Walton v. Kersop, 2 Wils. 354; Abercrombie v. Parkhurst, 2 B. & P. 480; Ward v. Lavile, Cro. El. 896.

⁴ Gardner v. Humphreys, 10 Johns. 58.

⁵ Nichols v. Nichols, 10 Wend. 629.

⁶ Taylor v. Wells, 2 Saund. 74, b.

⁷ Pope v. Tillman, 7 Taunt. 642.

⁸ Berne v. Mattaire, Ca. Temp. Hardw. 119.

by the Revised Statutes. "No aid prayer shall be allowed in this action; but any person having an estate in the lands or tenements upon which the distress in question was made, may, upon special cause shown to the court, and on such terms as it shall think equitable, be made a co-defendant in the action, or be permitted to defend separately, as the case may require."¹

§ 753. The general issue in replevin is, *non cepit modo et forma*, by which the defendant puts in issue not only the taking, but also the taking in the place mentioned in the declaration.² The extension of the action under the Revised Statutes rendered it necessary to furnish a new general issue, which should be also conformable to the action of detinue; they have accordingly enacted: "When the wrongful taking of the property described in the declaration is complained of, the plea of the general issue shall put in issue not only the taking of such goods and chattels, but such taking in the place stated. If the action is founded on the wrongful detention only, and the taking is not complained of, this plea shall put in issue not only the detention of the goods and chattels, but the property of the plaintiff therein." "With the plea denying the taking or detention of the property claimed, the defendant may give notice of any matters which, if properly pleaded, by avowry, cognizance, or plea, would be a bar to the action, and which if the goods have been replevied, would entitle him to a return thereof; and he may give such matters in evidence on the trial, in the same manner, and with the like effect, as if the same had been so pleaded. And the plaintiff may plead in answer, to any avowry or cognizance, as many several matters as he shall think necessary for his defence."³ In Virginia, a defendant in replevin cannot plead several matters of defence; although he is allowed to do so in Indiana.⁴

§ 754. The plea of *cepit in alio loco* does not admit the taking as laid in the declaration, and the plaintiff is bound to show his right to recover in the same manner as if the plea of *non cepit* had been interposed. Under this plea, a defendant will not be permitted to give special matter in evidence, by way of justification.⁵ Where a

¹ 2 R. S. 520, § 48.

² *Potter v. North*, 1 Saund. 847; *Anon.* 2 Mod. 199; *Walton v. Kersop*, 2 Wils. 585.

³ 2 R. S. 529, §§ 39, 40, 44, 45. Although the New York Court of Procedure has entirely remodelled and simplified the action of replevin, we yet continue our reference to the Revised Statutes of that

State, as containing the best exposition of the general principles of pleading in this action; as well as being the basis of that legislation which is still in force in many of the States.

⁴ *Vaiden v. Bell*, 8 Rand. 448; *Martin v. Ray*, 1 Blackf. 291.

⁵ *Williams v. Welch*, 5 Wend. 290; *McFarland v. Barker*, 1 Mass. 158.

plaintiff replies a claim of property to a plea justifying a taking of goods, under a plaint in replevin, he must designate the time of the claim with precision, so that issue can be taken on it. An averment of a claim, at the said time when, &c., referring to the day laid in the declaration, is not sufficient on special demurrer. The place of taking as well as the village or parish, is material and traversable, and, for want of such averment, the declaration is demurrable; and if the taking was in a different place from that mentioned in the declaration, he may plead *non cepit*, and give that fact in evidence and nonsuit the plaintiff.¹ But the defendant cannot have a return of the goods under this plea; and, therefore, if he wants a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration; and, in order to have a return, avow or make cognizance, stating the cause for which he distrained.² Nothing in arrear is equivalent to the general issue, when pleaded in bar to an avowry.³ The general issue, strictly speaking, puts in issue every material averment;⁴ not so, however, the plea of *riens in arrear*. It admits the title of the defendant as stated in the avowry, which, therefore, need not be proved, unless the plea be accompanied by a plea of non-tenure.⁵

§ 755. In answer to the declaration, the landlord may *avow* the taking, and show his right, and the cause for which he took them; or if the landlord's bailiff have made the distress, and the action be against him, he must make *cognizance* by which he acknowledges the taking in right of his principal, and shows the landlord's right. Where the suit is against both, the one avows and the other makes cognizance. An avowry is in the nature of a declaration, to which the plaintiff may be compelled to plead or answer, as in other actions. It sets forth the nature and merits of the defendant's case, showing that the distress taken by him was lawful, and is proper in all cases where he expects to have a return.⁶ Formerly more strictness was required in pleading an avowry or cognizance, as well in setting forth the matter in avoidance, as in stating the title which formed the inducement, than in a declaration.⁷ The landlord was bound to show a complete title, and if possessed of a term

¹ *Lisher v. Pierson*, 2 Wend. 845; *Potter v. North*, *supra*; *Johnson v. Wollyer*, 1 Stra. 507; *Anon.* 2 Mod. 199.

² *Crosse v. Bilson*, 6 Mod. 102; *Anon.* 1 Vent. 127.

³ *Harrison v. McIntosh*, 1 Johns. 380.

⁴ *Rogers v. Arnold*, 12 Wend. 80.

⁵ *Bloomer v. Juhel*, 8 Wend. 448.

⁶ *Bac. Abr. tit. Replevin*; *Potter v. North*, 1 Saund. 347.

⁷ *Silly v. Dally*, 1 Ld. Ray. 381.

of years only, he was obliged to show the estate out of which his term was derived; because particular estates being created, by agreement of the parties, out of the primitive estates, it was the office of the court to judge whether the primitive estate and agreement were sufficient to produce the particular estate.¹ In all cases the avowry must still contain sufficient matter to entitle him to a return.² To obviate the difficulties which the avowant had to encounter, in setting forth a long and intricate title, the statute 11 Geo. II. c. 19, § 22, enabled defendants in replevin to avow or make cognizance in general terms;³ that the plaintiff, or other tenants of the lands whereon the distress was made, enjoyed the same under a grant or demise, at a certain rent, during the time wherein the rent distrained for was incurred, which rent was then in arrear; and that the place where the distress was taken was parcel of the tenements for which the rent became due.

§ 756. This provision much simplified the ancient practice, and was first introduced into New York by the Revised Statutes. It is still necessary, however, that an avowry should distinctly show a compliance with every provision of the statute applicable to the case, and of every other fact which entitles the party to distrain. Thus it must show a demise;⁴ and care must be taken that it is correctly stated.⁵ The defendant must show who is tenant,⁶ although he need not state in express terms that he is tenant to the avowant; and if the fact of the tenancy can be collected from the whole of the avowry, it will be sufficient.⁷ It must appear at what rent the premises were held, and when payable;⁸ but a defendant has been allowed to recover rent for a less period than he claimed by his avowry to be due to him.⁹ If substantially bad in part, it is bad for the whole. Thus in an avowry for rent, upon taking goods in a place off the demised premises, if only part of the rent avowed for be the subject of distress, the avowry is bad *in toto*.¹⁰ But where the avowry described the premises as a dwelling-house, with the appurtenances, and it appeared in evidence to be but the upper part of the house that the plaintiff held as tenant, the shop and yard being let to another person; this was held to be no variance.¹¹

¹ *Silly v. Dally*, *supra*; *Reynolds v. Thorpe*, 1 Stra. 796.

² *Hopkins v. Hopkins*, 10 Johns. 869; *Goodman v. Aylin*, Yelv. 148; *Reynolds v. Thorpe*, *supra*; *Silly v. Dally*, *supra*; *Bain v. Clark*, 10 Johns. 424.

³ *Roulston v. Clarke*, 2 H. Bl. 563.

⁴ *Hayward v. Haswell*, 6 Ad. & E. 265.

⁵ *Philpott v. Dobbinson*, 6 Bing. 104.

⁶ *Banks v. Angell*, 7 Ad. & E. 843.

⁷ *Innes v. Colquhoun*, 7 Bing. 265.

⁸ *Smith v. Walton*, 1 Moore & S. 380;

Laycock v. Tufnell, 2 Chit. 531.

⁹ *Forty v. Imber*, 6 East, 434.

¹⁰ *Burr v. Van Buskirk*, 3 Cow. 263.

¹¹ *Page v. Chuck*, 10 Moore, 264.

§ 757. The statute just referred to has done away with the necessity of any special pleading in this action ; but independent of the statute, to an avowry or cognizance the tenant may plead, denying the demise, or tenure as set forth in the avowry, and throw the issue upon the defendant ; who must then prove the demise. But if he only shows an agreement for a lease, it is insufficient,¹ unless the tenant has occupied and paid rent.² And the terms of the tenancy must be proved as laid, for a variance as to the amount of rent is fatal,³ though it is not a material variance, if it appear that the plaintiff holds for a less term than that stated in the avowry.⁴ An avowry or cognizance for rent admits the property of the goods in the plaintiff ; but if the plaintiff's plea subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action.⁵ The tenant may also show that the demise was bad in law by reason of the coverture⁶ or infancy of the plaintiff ;⁷ or if good, that the defendant evicted the plaintiff ;⁸ that the rent was tendered before suit brought ;⁹ that the defendant had been satisfied by a former distress ;¹⁰ or that nothing is in arrear.¹¹ A set-off cannot be pleaded to an avowry for rent :¹² but plaintiff may plead in bar, that he had paid a sum for ground-rent, or taxes, &c.¹³ A plea of *non-tenure* to an avowry for rent, setting forth seisin in A. B., and deducing title from him to the avowant, and also showing a reversionary interest in the avowant after the termination of the demise under which the distress was made, admits the seisin of the demise to the avowant from the tenant of the freehold ; it only puts in issue the demise under which the distress was taken.¹⁴ But a plea to an avowry that the landlord holds under a title which in law amounts to a mortgage, but which has not been recorded, and that the plaintiff holds under the same person from whom the landlord derives title, by a *bond fide* purchase for a valuable consideration, is good, and a complete answer to the avowry. Nor does such plea amount to a disseisin, inasmuch as it shows that the relation of landlord and tenant does not exist ; for the rule that a tenant shall not

¹ *Dunk v. Hunter*, 5 B. & A. 322.

² *Knight v. Benett*, 8 Bing. 361.

³ *Brown v. Sayce*, 4 Taunt. 820.

⁴ *Forty v. Imber*, 6 East, 434 ; *Harrison v. Barnby*, 5 T. R. 248.

⁵ *Clarke v. Davies*, 7 Taunt. 72.

⁶ *Clarke v. Davies*, *supra*.

⁷ *Wilson v. Ames*, 1 Marsh. 74.

⁸ *Hunt v. Cope*, Cowp. 242.

⁹ *Pim v. Greville*, 6 Esp. 95 ; *Bul. N. P.* 60.

¹⁰ *Lingham v. Warren*, 2 Brod. & B. 36.

¹¹ *Cobb v. Bryan*, 8 B. & P. 348.

¹² *Abbeolon v. Knight*, Barnes, 450 ; *Laycock v. Tufnell*, 2 Chit. 531.

¹³ *Stubbs v. Parsons*, 8 B. & A. 516 ; *Bradbury v. Wright*, 2 Doug. 625.

¹⁴ *Bloomer v. Juhel*, 8 Wend. 448.

plead *nil habuit in tenementis* applies only where there is a tenancy in fact.¹

§ 758. The place of taking a distress for rent is material and traversable; and where the defendant in his avowry, states the precise place or house, the plaintiff may traverse the place in the avowry, though not described with certainty in the declaration. But where the plaintiff does not traverse the place in the avowry, but joins issue on the tenancy, the *locus in quo* is rendered immaterial; and the plaintiff may show the taking of the goods in another place than the house demised, especially where the goods were removed from such house, leaving the rent unpaid, and were seized within thirty days thereafter. If the plaintiff means to make the place material, he must, in his plea in bar, or replication to the avowry, traverse the taking in the place alleged in the avowry, and take issue thereon.² The plaintiff may plead in bar to the avowry, that the avowant so abused the distress, as to render himself a trespasser *ab initio*; but a plea of *de injuria*, &c., generally would be bad;³ for he must take issue upon some particular allegation in the avowry.⁴ An officer sued for an act done by virtue of his office, may give any special matter in evidence under the plea of the general issue, without notice;⁵ and has all the rights, and is entitled to the same judgment which a defendant, not an officer, is entitled to under a plea of the general issue, with notice of the special matter.⁶ The plea of property in a stranger, or in the defendant himself, may be pleaded either in abatement or in bar, and entitles the party to a return without an avowry.⁷ Such plea, however, must contain a traverse of the right of the plaintiff, and if issue be taken upon such plea by replication affirming the property to be in the plaintiff, the material inquiry for the jury is, whether the property is in the plaintiff.⁸

§ 759. If the plaintiff fails to establish an exclusive right to possess and control the property, the defendant is entitled to a verdict. But a defendant will not be entitled to a return of the goods, by simply showing property in a stranger; he must connect himself

¹ *Brown v. Dean*, 8 Wend. 208.

² *Jackson v. Rogers*, 11 Johns. 83.

³ *Hopkins v. Hopkins*, 10 Johns. 869.

⁴ *Ib.*; *Jones v. Kitchin*, 1 B. & P. 76.

⁵ *Coon v. Congdon*, 12 Wend. 496.

⁶ *Seymour v. Billings*, 12 Wend. 285.

⁷ *Harrison v. McIntosh*, 1 Johns. 880;
Quincy v. Hall, 1 Pick. 357; 1 Vent. 249;

Martin v. Ray, *supra*. But *nil habuit in tenementis* is no plea to an avowry for rent. *Parry v. House*, Holt, 489; *Sullivan v. Stradling*, 2 Wils. 208.

⁸ *Ingraham v. Hammond*, 1 Hill, 853;
Lisher v. Pierson, 2 Wend. 345; *Tuley v. Mauzey*, 4 Ky. 6.

with the title of the stranger, and thus establish a right paramount to that of the plaintiff, justifying the taking of the property out of his possession.¹ Where a plea of property in a stranger is interposed, as well as of *non cepit*, a verdict for the plaintiff upon the latter plea determines nothing between the parties but the taking; and the plaintiff is not entitled to recover unless the other issue be also found for him.² On an issue, in which the plaintiff to an avowry for rent pleads, denying the seisin of the landlord, the demise, the tenancy, and the assignment of the plaintiff: evidence that the defendant in replevin holds by virtue of a deed from the grantor of the plaintiff, executed to him as a security for the payment of money; and that the conveyance to the plaintiff was recorded, and the deed to the defendant not recorded, entitles the plaintiff, and not the defendant, to a verdict.³ And although a tenant may not dispute his landlord's title, after paying him rent, yet, if by mistake or misrepresentation he pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence on a plea of *non tenuit* in replevin against the supposed landlord, whatever tends to show that the latter is not entitled to the rent.⁴

§ 760. Tenants in common must avow for their separate portions, joint tenants may either join or sever;⁵ but if one joint tenant or tenant in common have distrained for the rent due for both shares, and the action be brought against one, he should avow for his own share, and for the other share make cognizance as bailiff of his co-tenant.⁶ If, however, the defendants make cognizance, first, as bailiffs of A. and B., and secondly, as bailiffs of A.; B. will not be a competent witness for the defendant to sustain the second cognizance, though the defendants gave no evidence to sustain the first cognizance, and offered to abandon it.⁷ An avowry by an executor must show affirmatively, that the rent fell due before the testator's death.⁸ Where the defendant in his avowry averred that the plaintiff, as his tenant, held and enjoyed certain premises, for the space of seven years and six months, under a certain demise, and at a certain rent; and by the evidence it appeared that the premises were held by the plaintiff only seven years and six months, the

¹ Rogers v. Arnold, 12 Wend. 80.

² Bemus v. Beekman, 8 Wend. 667.

³ Brown v. Dean, 8 Wend. 208.

⁴ Rogers v. Pitcher, 6 Taunt. 202.

⁵ Harrison v. Barnby, 5 T. R. 246.

⁶ Pullen v. Palmer, 5 Mod. 78.

⁷ Girdlestone v. McGowran, 1 Car. & K. 702.

⁸ Wright v. Williams, 5 Cow. 383, 501.

variance was adjudged to be fatal.¹ It is not necessary to aver that the rent continued in arrear at the time of making the avowry.² Nor is the sum stated in the avowry to be due for rent, material; for if it appears that less rent is due than defendant has avowed or made cognizance for, he is yet entitled to recover for so much as is due.³ But where the avowry is for parcel of a year's rent or penalty only, it ought to show that the residue has been satisfied or discharged, otherwise it will be bad on demurrer.⁴ If the avowry be for a certain amount, part whereof is not due at the time of the distress, and judgment is entered for the whole, it will be error; but it may be cured before judgment by abating the avowry as to the part not yet due.⁵ An avowry justifying the taking a distress for the rent of ready-furnished lodgings is good; it having been determined that a landlord is entitled to distrain for the rent of ready-furnished lodgings.⁶ And where the husband distrains and avows for rent arising from the land of the wife, without joining her in the proceeding, he must show affirmatively that the rent accrued after the marriage, for this cannot be intended; and if that fact be not shown, the objection may be taken at the trial.⁷ According to the practice of Pennsylvania, an avowry need not state for what lands the rent arose, nor when it became due.⁸

§ 761. An avowry showing a conclusive bar to the action is a perfect pleading requiring an answer, although it immediately follows a plea of property in a stranger; and it is not to be considered as matter, pleaded to induce a return of the property; a party under such plea being entitled to a return without avowry or cognizance.⁹ But an avowry of taking goods off the demised premises, for rent arrear, should show affirmatively that possession continued on the part of the tenant, if the lease has expired; or it will be bad on general demurrer.¹⁰ Both parties being actors in replevin, the plaintiff in respect of his action, and the defendant in consequence of his having made the distress, being a claim of right, and the avowry in the nature of a declaration, either may notice the cause

¹ *Tice v. Norton*, 4 Wend. 668.

² *Clarke v. Davies*, 7 Taunt. 72.

³ Per Lord Ellenborough in *Forty v. Imber*, 6 East, 487.

⁴ *Shepherd v. Boyce*, 2 Johns. 448; *Hunt v. Braines*, 4 Mod. 402; *Johnson v. Baynes*, 12 *id.* 84; *Holt v. Sambach*, Cro. Car. 104.

⁵ *Duppa v. Mayo*, 1 Wms. Saund. 285, n. 6, 8; *Harrison v. Barnby*, 5 T. R. 246.

⁶ *Newman v. Anderton*, 5 B. & P. 224.

⁷ *Decker v. Livingston*, 15 Johns. 479.

⁸ *Albright v. Pickle*, 4 Yeates, 264;

Weidell v. Roseberry, 13 S. & R. 180.

⁹ *People v. New York*, C. P., 2 Wend. 644.

¹⁰ *Burr v. Van Buskirk*, 2 Cow. 268.

for trial; yet, at common law, neither can move for judgment as in case of nonsuit.¹ And the jury may give such damages as they think the party is justly entitled to for the injury sustained.² Where a plaintiff in replevin to an avowry for rent pleads a tortious eviction by the landlord, such plea is not sustained by proof that the landlord entered by virtue of *summary proceedings* for the non-payment of rent. And although such entry be found by special verdict, the tenant is not entitled to judgment in this action for goods subsequently taken as a distress for rent, where he pleads a *tortious eviction*. To enable him to avail himself of such entry in bar of a distress for rent, he should *specially plead* the resort of the landlord to the other remedy. But, on the contrary, the landlord under such verdict, is entitled to judgment *non obstante veredicto*.³

§ 762. If the plaintiff recovers, he has judgment for damages only, provided the goods have been delivered to him.⁴ But the judgment for the avowant, or person making cognizance varies in different cases; it may be at common law *pro retorno habendo*, or founded on the statutes.⁵ If the property specified in the declaration shall not have been delivered to the plaintiff on the replevin, he shall in case the judgment is in his favor, be entitled, in addition to his judgment for damages and costs, to a further judgment, that the property be returned to him without delay, or, in default thereof, that he recover from the defendant the value of such goods and chattels, as assessed by the jury on the trial, or upon a writ of inquiry.⁶ If the property specified in the writ have been delivered to the plaintiff, and the defendant recover judgment, the judgment shall be, that the defendant shall have return of the property replevied, unless he elects to waive such return; and also that he recover damages for the detention of the property, to be ascertained by a writ of inquiry.⁷ But without the aid of this statute, where there is no other plea than *non cepit*, the defendant is not entitled to a return, for this is not a plea involving the merits of the action; and he can only have a return in cases where he

¹ Barrett v. Forrester, 1 Johns. Cas. 247.

² Dorsey v. Gassaway, 2 Har. & J. 402; Bruce v. Learned, 4 Mass. 614.

³ McCarty v. Hudsons, 24 Wend. 291.

⁴ Easton v. Worthington, 5 S. & R. 180; Powell v. Hinsdale, 5 Mass. 848; F. N. B. 69.

⁵ See the cases in Mounson v. Redshaw, 1 Wms. Saund. 195, n. 8; Poole v. Longueville, 2 id. 286, n. 5.

⁶ 2 R. S. 580, § 49.

⁷ Id. 581, § 55; Clark v. Adair, 3 Haringt. 118.

adds an avowry, or cognizance, or some plea leading to the conclusion, that taking the goods was not merely unjustifiable, but that the defendant was rightfully in possession of them, at the time they were taken out of his possession by the writ of replevin.¹ And it is now held, that a defendant in replevin, who succeeds on the trial under the plea of *non detinet*, is not entitled to a return of the property, or its value, unless he proves property in himself, as well as detention; nor then, perhaps, unless he has pleaded or given notice of such matter as will entitle him to a return.²

§ 763. The execution is the same as in ordinary cases, by *fi. facias*, if the plaintiff have judgment, for damages and costs; or if the defendant, for the arrears of rent or the value of the distress. And if the defendant have judgment for a return, he may have a writ *de retorno habendo* for a return of the things distrained, besides a *fi. fa.* for his costs.³ The sheriff, however, is not bound to execute the writ for a return, unless some person attend, on the behalf of the defendant, to show him the goods; and it is a good return to the writ that no person attended for the purpose. At common law, if to a writ of *retorno habendo* the sheriff return that the goods are eloigned (that is, conveyed to places unknown to him, so that he cannot execute the writ), the defendant might sue out a *capias in withernam*, requiring the sheriff to take other cattle of the plaintiff, to the value of the cattle eloigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver him the cattle originally replevied. If this writ was returned *nihil*, after an *alias* and *pluries*, the defendant might sue out a *scire facias* against the plaintiff's pledges, to show cause why the price of the cattle, &c., eloigned should not be made of their lands and goods, and rendered to the defendant. If no good cause was shown, a writ issued to take the cattle, &c., of the pledges; but if they had none, a *scire facias* issued against the sheriff himself, requiring him to show cause why he should not render to the defendant cattle, &c., to the value of those eloigned.⁴ This circuitous method, however, of proceeding against the sheriff might be avoided, by bringing an action on the case against him for damages, on the return of the *elongata*.⁵ The writ of *withernam* is a common-law

¹ *People v. Niagara* C. P., 4 Wend. 74, b; *Mounson v. Redshaw*, 1 *id.* 195, 217.

² *Pierce v. Van Dyke*, 6 Hill, 618.

³ 8 Archb. Pr. 84.

⁴ *Taylor v. Wells*, 2 Wms. Saund.

n. 8.

⁵ *Richards v. Acton*, 2 W. Bl. 1220; *Page v. Eamer*, 1 B. & P. 878; *Tesseyman v. Gildart*, 4 *id.* 292.

reprisal, calculated to take from the defendant goods to such an amount as will secure the return of the plaintiff's; and follows a return of *elongata* on the writ of replevin, without an *alias* or *pluries*, in the State of South Carolina, under the Statute of that State, passed in 1808.¹ It is incident to the common-law action of replevin, and is in force in all those States that have not expressly abolished it.²

SECTION III.

ACTION OF TRESPASS.

§ 764. If the tenant should be turned out of, or disturbed in, the possession of the demised premises, by a stranger having no title, his only remedy is by an action of ejectment or trespass, if he is actually put out; or by trespass or case (according to circumstances), if he is merely disturbed in the possession. Trespass is the proper remedy to recover damages, for an illegal entry upon, or an *immediate* injury to, property real or personal; while case lies for *consequential* damages to such property, or to some right or privilege incident thereto. But if the tenant is put out of possession by a stranger having title, where the ouster comes within the meaning of the landlord's covenant and agreement for quiet enjoyment, express or implied, he may also proceed against the landlord for damages, by action upon such covenant or agreement.³

§ 765. The right to land is exclusive, and every unwarranted entry by a person, or his cattle, on the land of another without the owner's leave, whether it be enclosed or not, or without the license or authority of law, is a trespass.⁴ Thus, an *entry* on land, without claim or color of title;⁵ under a void lease;⁶ or a mere executory contract;⁷ or a continuance there, after a request to leave, or even going upon another's land, and taking away one's own prop-

¹ *Swann v. Shemwell*, 2 Har. & G. 288.

² *Gould v. Warner*, 3 Wend. 54; *Hart v. Tobias*, 2 Bay, 408; *Huggeford v. Ford*, 11 Pick. 228.

³ *Seneca R. R. v. Auburn R. R.*, 5 Hill, 170; *Hayward v. Banks*, 2 Burr, 1114; *Rex v. Watson*, 5 East, 486; *Rex v. Wilson*, 11 *id.* 56.

⁴ *Wells v. Howell*, 19 Johns. 385; 3 Bl. Com. 209; *Adams v. Freeman*, 12 Johns. 408; *Commonwealth v. Peters*, 2 Mass. 127; *Brown v. Perkins*, 1 Allen, 89. *Ante*, §§ 174, 524.

⁵ *Jackson v. Holden*, 2 Johns. 22; *Tonawanda R. R. v. Munger*, 5 Den. 255.

⁶ *Chandler v. Edson*, 9 Johns. 362.

⁷ *Erwin v. Olmsted*, 7 Cow. 229.

erty, is a trespass.¹ So for any entry on a highway, inconsistent with the right of the owner of the soil, and not necessary to the right of way of the public; or where one enters and builds upon the land of another, who enters upon the intruder; and the intruder, in his turn enters, and turns the owner out of possession, the owner may, in either case, maintain this action.² Any direct injury to any thing growing, or placed upon the land, is an injury to the land itself. By the Revised Statutes of New York, every person who shall cut down or carry off any wood, underwood, trees or timber, or shall girdle or otherwise despoil any trees on the land of another person, without the leave of the owner thereof, or on the land or commons of any city or town, without having any right or privilege in such commons, and without license from the corporation, or proper officers of such city or town, shall forfeit and pay to the owner of such land, or to such city or town, treble the amount of the damages which shall be assessed therefor, in an action of trespass. But if upon the trial of any such action, it shall appear that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own; or that such wood, trees, or timber were taken for the purpose of making or repairing any public road or bridge, by the authority of a commissioner or overseer of highways; judgment shall be given to recover only the single damages assessed by the jury. And if any person be disseised, ejected, or put out of any lands or tenements in a forcible manner, or, being put out, be afterwards holden or kept out by force, or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein treble the damages assessed by the jury.³

§ 766. The owner's license to enter may frequently be *presumed*, and will then be equally valid as if expressly given; and for all purposes of this action, a tenant in possession is to be considered the owner. But whether *express* or *implied*, the license may at any

¹ *Blake v. Jerome*, 14 Johns. 406; *Kissecker v. Monn*, 86 Pa. St. 313. A recent law of New York declares that any person who shall intrude or squat upon any city, town, or village lot, without license from the owner, or who shall, without such license, erect any hut, shanty, or other structure thereon, shall be deemed guilty of a misdemeanor, and shall be punished by fine and imprisonment. The owner may give notice to any person who may have already intended to

remove in not less than ten days, and if they remain after that period, they shall also be deemed guilty of a misdemeanor, and liable to similar punishment. After the expiration of said ten days, the owner may also cause such erection to be removed and abated as a nuisance, and the intruders and squatters to be themselves removed. Laws of 1857.

² *Colden v. Eldred*, 15 Johns. 220; *Babcock v. Lamb*, 1 Cow. 238.

³ 2 R. S. 838, §§ 1, 2, 4.

time be revoked, unless it has been founded on such a valuable consideration as would support a contract, and a subsequent entry would then become a trespass.¹ A parol license to do an act on one's own land, however, affecting injuriously the air and light of a neighbor's house, is not revocable by such neighbor after it has once been acted on; nor is such a license within the statute of frauds.² And when a license is given, it necessarily implies a right to do every thing, without which the act could not be done.³ In general, where an erection is made upon the land of another, without his consent, and afterwards continued there without such consent, the continuance is deemed a fresh trespass; and the party injured may maintain an action of trespass from time to time, even although he brought an action for the original erection, and recovered damages.⁴ But where A. and B., owning the adjoining lands, agreed that B. might cut ditches on A.'s land, and under A.'s direction, and continue so long as he should be satisfied; and the ditches were dug and used during A.'s lifetime, and for three years afterwards, without complaint; it was held, that although the license to use the ditches on A.'s land expired on his death, and the person succeeding to his title might fill them up, if he thought proper to do so, he could bring no action against B. without first giving reasonable notice to discontinue the use of the ditches.⁵

§ 767. Authority to enter on lands is given, by law, in many cases; as to see that the tenant keeps the premises in good repair, according to agreement, or to levy a distress; but if, in such case, the authority is abused, at common law the party becomes a trespasser from the beginning, and his original entry, and every act done in pursuance of it, is viewed in the same light as if the law had not given him authority in the first instance.⁶ And, in strictness, if the landlord accidentally committed an irregularity, either in taking the distress, or in any subsequent proceeding (whether for rent or damage feasant), he thereby became a trespasser from the beginning, and was immediately liable to an action of trespass on the part of the tenant.⁷ Such is still the law, in regard to a

¹ *Baker v. Dumbolton*, 10 Johns. 240.
See *ante*, § 524.

² 3 Kent. Com. 451.

³ *Dennett v. Grover*, Willes, 195.

⁴ *Holmes v. Wilson*, 10 Ad. & E. 508.

⁵ *Carter v. Page*, 4 Ired. 424.

⁶ *Allen v. Crofort*, 5 Wend. 506; *Oxley v. Watts*, 1 T. R. 12.

⁷ *Griffin v. Scott*, 2 Ld. Ray. 1424;
Dye v. Leatherdale, 8 Wils. 20; *Dod v. Monger*, 6 Mod. 216.

distress for damage feasant; but as to a distress for-rent, trespass lies only where the distress is altogether wrongful and illegal *ab initio*; as where rent is due, or made after a tender of the amount due,¹ or, in general, wherever the particular act of irregularity amounts to a trespass independent of the previous proceedings.² Thus it lies for turning the tenant out of possession, under a distress warrant; or, if the tenant tender the rent and expenses after the distress, but before impounding for subsequently removing the distress;³ but not for selling after a tender, where such tender is made after the impounding.⁴ And though the party may, in these cases, bring trespass, he may also waive the trespass, and bring case.⁵

§ 768. Either trespass or trover will lie in the case of a distress for rent, where there has been an illegal taking; as for distraining implements of trade, or beasts of husbandry, where there was a sufficiency of other property;⁶ or a horse, while his rider was upon him;⁷ or if the outer door be shut.⁸ For the statute which enacts that a party distraining for rent shall not be a trespasser from the beginning, only relates to irregularities after a lawful taking.⁹ So that wherever there is an abuse of authority given *by law*, the party injured may not only prosecute his action for trespass for the illegal entry, but may also sue in trover, and recover the value of the goods. But an abuse of an authority *in fact*, that is, of an authority given by the party, does not render a man a trespasser *ab initio*. Thus if a bailee of chattels abuse his authority, he is only liable in case for such abuse. And if a distress taken for a rent-charge is abused, the distrainer does not become a trespasser *ab*

¹ F. N. B. 88; Gorton v. Falkner, 4 T. R. 565; Shipwick v. Blanchard, 6 *id.* 298.

² Aitkenhead v. Blades, 5 Taunt. 198; Reed v. Harrison, 2 W. Bl. 1218.

³ Virtue v. Beasley, 1 Mood. & R. 21.

⁴ Ellis v. Taylor, 8 M. & W. 415; Thomas v. Harris, 1 Scott, N. R. 524; Ladd v. Thomas, 4 Per. & D. 9.

⁵ Branscomb v. Bridges, 1 B. & C. 145. These rules of law, with a salutary modification as to a tender of amends, passed into an enactment in the Revised Statutes of New York, which declared, — When any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not therefore be deemed unlawful, nor the party making it a trespasser from the be-

ginning; but the party aggrieved may maintain an action of trespass, or of trespass on the case, and may recover full satisfaction for the special damages he may have sustained by such irregularity, or such unlawful act, with full costs of suit, and no more, unless tender of amends hath been made by the party distraining, or his agent, before such action brought; which tender shall prevent the recovery of any costs in such action. 2 R. S. 505, § 28; 11 Geo. II. 6, 19, § 19.

⁶ F. N. B. 88; Gorton v. Falkner, *supra*; Hutchins v. Chambers, 1 Burr. 579.

⁷ Moore v. Beamont, 6 T. R. 138.

⁸ Etherton v. Popplewell, 1 East, 139; Winterbourne v. Morgan, 11 *id.* 395; Messing v. Kemble, 2 Camp. 115.

⁹ Wallace v. King, 1 H. Bl. 13.

initio; because such distress must, at common law, be made under an authority in fact, as a right to distrain is not, by such law, incident to a rent-charge.¹ The reasons of this difference, between the abuse of an authority *in law* and an authority *in fact*, is said to be, that when the law gives an authority, it is on condition only that it shall be used for the purpose allowed by law, and the law judges of and infers the original intention of the party from his subsequent acts; but where the party authorizes a particular act he cannot, for any subsequent abuse, punish in respect of that which was done by his own license.

(a.) *Trespass on the Case.*

§ 769. According to strict common-law principles, the distinction between case and trespass, formerly adverted to, becomes important when determining upon the proper remedy for an injury; for if a plaintiff declare in trespass, when his action should be case, he will be nonsuited at the trial. His declaration, however, will be held sufficient if it contains enough to maintain case, although it may commence by miscalling the action trespass.² As a general rule, where a statute gives damages for an injury, and does not mention the form of action, case lies.³ But where an action may be sustained at common law, and a statute also gives an action, without expressly or impliedly taking away the common-law right, an action may be maintained at common law, as well as upon the statute.⁴ The difficulty which frequently arises, in determining whether the action shall be case or trespass, according as the injury resulting from the act of the defendant is consequential, or immediate and direct, was obviated in New York, by the Revised Statutes, which declared—Whenever, by the wrongful act of any person, an injury is produced either to the person, personal property, or rights of another, for which an action of trespass may be maintained, an action of trespass on the case may also be brought, to recover damages for such injury; whether it was wilful, or

¹ 3 Stark. on Evid. 1108, 8d edit. Where several persons are implicated in, or have assented to, one joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable. *Eliot v. Allen*, 1 C. B. 18; *Hill v. Goodchild*, 5 Burr. 2790.

² *Seneca R. R. v. Auburn R. R.*, 5 Hill, 170.

³ *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36; *Cane v. Chapman*, 1 Nev. & P. 104.

⁴ Com. Dig. Action on Statute, C.

accompanied by force, or not; and whether such injury was a direct and immediate consequence from such wrongful act, or only consequential.¹ According to this statute, therefore, case would always lie, though trespass might not; and the practitioner need not hesitate in any emergency to shape his action in case. But there was no objection to adopting this course of practice, as a general thing, in any case; for an action on the case was better calculated to bring out the truth of a case than any other. The Code of Procedure, in that State, as we have seen, has abolished the distinction altogether; but as the common-law doctrine is still important in those States where this statute has not been adopted, it will be proper to exhibit it still further in detail.

§ 770. We have said that case is the appropriate remedy, where the injury is not immediate but consequential. Thus it lies against a sheriff for removing goods from the demised premises, without satisfying the landlord's claim for a year's rent.² But he is not liable unless he knew that rent was due; although express notice is not necessary to render him liable, in which respect, we have observed, the law of New York differs from the English law.³ Case is also the proper remedy where a distress for rent is either illegal or irregular; or at the suit of a lodger, whose goods are taken upon an excessive distress by the superior landlord; and even in those cases where trespass may be maintained, case also lies, as a party may waive the trespass and bring case.⁴

§ 771. For an abuse of a distress, trespass is the proper remedy;⁵ but for impounding cattle in a wrong county, the landlord will not be liable in trespass.⁶ Nor will trover lie for goods irregularly sold under a distress;⁷ or for an excessive distress;⁸ since the statute gives another remedy; and trespass only lies where there has been some act done which, in itself, amounts to a trespass,—the election given by the statute being so construed.⁹ So trespass cannot be maintained for taking an excessive distress, where the distress was lawful, the whole being one entire act;¹⁰ nor for an irregular distress, where the irregularity complained of

¹ 2 R. S. 553, § 16.

² Reed v. Thoyts, 6 M. & W. 410; Forster v. Cookson, 1 Gale & D. 58; Arnitt v. Garnett, 8 B. & A. 440.

³ Smith v. Russell, 8 Taunt. 400; Andrews v. Dixon, 8 B. & A. 645.

⁴ Branscomb v. Bridges, 1 B. & C. 145; Fisher v. Algar, 2 C. & P. 874.

⁵ Hutchins v. Chambers, 1 Burr. 590.

⁶ Gimbart v. Pelah, 2 Stra. 1272.

⁷ Wallace v. King, 1 H. Bl. 18.

⁸ Whitworth v. Smith, 1 Mood. & R. 198.

⁹ Ladd v. Thomas, 4 Per. & D. 9; Winterbourne v. Morgan, 11 East, 395; Messing v. Kemble, 2 Camp. 115.

¹⁰ Lynne v. Moody, 2 Stra. 851.

is not in itself an act of trespass, but consists merely in the omission of some form required in conducting the distress, such as not procuring goods to be appraised before they are sold; but case is the proper remedy in all such cases.¹ Yet if the landlord fails to show a right to distrain,—as if the affidavit accompanying the warrant of distress is defective,—he is liable in this action.²

§ 772. The act of Pennsylvania, of 1792, provides that where a distress is made, when no rent is in arrear, the owner of the goods may, by an action of trespass or on the case, recover double the value of the goods. But, notwithstanding this provision, it has been held that the party aggrieved may maintain action at common law, for entering his close, &c., in which he may recover damages to a greater amount than double the value of the goods.³ A tenant from year to year, being desirous of letting his house for a quarter, quitted and left it locked, with authority to the landlord to let it during his absence, if an opportunity offered, and, for that purpose, left the key with a neighbor; an opportunity offered of letting the house, but the person who had the key having absconded, the landlord entered by placing a ladder against the house, and raising the first-floor window; and, after showing the house, left it in the same state as before. The house was afterwards entered by persons unknown, and some of the tenant's wearing apparel and furniture stolen; and the tenant having brought an action of trespass against the landlord, for breaking and entering the house and leaving it insecure, in consequence of which his furniture and apparel were stolen, it was held that a plea of leave and license was no answer to the action.⁴ So in a case where the landlord, upon making a distress, turned the tenant's family out of possession, and continued in possession himself, after the rent was paid, he was held to be guilty of a trespass.⁵

§ 773. If a man sells a chattel, being upon his land, he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises and take away the subject of his purchase, without being considered a trespasser.⁶ So if a man, in virtue of his license, erect a building on another's land, this license cannot be revoked so entirely as to make the person who erected it a tres-

¹ *Messing v. Kemble*, 2 Camp. 115; *Marquissee v. Ormston*, 15 Wend. 368.

² *Ib.* And see *Alcott v. Frazer*, 5 Hill, 562.

³ *Rees v. Emerick*, 6 S. & R. 286.

⁴ *Ancaster v. Milling*, 2 Dowl. & R. 714.

⁵ *Etherton v. Popplewell*, 1 East, 189.

⁶ *Parker v. Staniland*, 11 East, 866.

passer, for entering and removing the building after the revocation.¹ In general, whenever the act complained of is under regular process of law, case is the only remedy, and trespass will not lie;² but where it is not under color of process, the remedy is trespass, and not case. Thus if the process be irregular;³ or if the court has no jurisdiction;⁴ or exceed its jurisdiction;⁵ the action should be either trespass or trover; that is, trespass for the act itself, and trover if the goods be detained, to recover them back. If, however, a proceeding is instituted in a court not having jurisdiction, yet if it were malicious, or unfounded, it has been held that the plaintiff may bring either case or trespass.⁶

§ 774. The property affected must, in general, be something tangible and fixed, as a house, room, out-house, or other building, or land; even though the land be not fenced in from the property of others, or be a highway; the term *close* being technical, and signifying the interest in the soil, and not merely an enclosure in the common acceptance of the term.⁷ And trespass lies though the door of a house be open, or the *locus in quo* unenclosed.⁸ If the land be covered with water, the plaintiff should allege that the trespass was upon his close covered with water; and though it may be alleged that the defendant broke and entered a several fishery, yet if the plaintiff's interest is confined to the water only, trespass will not lie, but the remedy is case.⁹ If trees are excepted in a lease, the land on which they grow is excepted also, and the landlord may enter to fell and take away the trees;¹⁰ but an exception of underwood does not except the land on which it grows.¹¹ And the possession remaining in the lessor, or other party entitled to the trees, he may maintain *trespass* against the lessee, or a stranger, for breaking and entering his close and cutting them down, and *trespass de bonis asportatis* for carrying them away; but the lessee cannot maintain any action, because he has no interest in the trees.¹² Yet, where the trees are not excepted in the lease, the ten-

¹ *McNeal v. Emerson*, 15 Gray, 884, 885.

² *Johnston v. Sutton*, 1 T. R. 544; *Morgan v. Hughes*, 2 *id.* 225; *Belk v. Broadbent*, 8 *id.* 185.

³ *Elsee v. Smith*, 1 Dowl. & R. 97.

⁴ *Perkin v. Proctor*, 2 Wils. 882; *Case of the Marshalsea*, 10 Co. 76, a.; *Bramwell v. Penneck*, 7 B. & C. 586.

⁵ *Cocker v. Crompton*, 1 B. & C. 489.

⁶ *Gates v. Bayley*, 2 Wils. 818; *The Mayor v. Ward*, 1 *id.* 107.

⁷ *Van Rensselaer v. Van Rensselaer*, 9 Johns. 377; *Harrison v. Parker*, 6 East, 154; *Stammers v. Dixon*, 7 *id.* 207; *Goodtitle v. Alker*, 1 Burr. 183.

⁸ Co. Lit. 4, b; Bac. Abr. *Trespass*, F. 679.

⁹ Co. Lit. 4, b; *ib.* 5 b.

¹⁰ *Pomfret v. Ricroft*, 1 Saund. 322, b.

¹¹ *Legh v. Heald*, 1 B. & Ad. 622.

¹² *Rolls v. Rock*, 2 Selw. N. P. 1287; *Ashmead v. Ranger*, 1 Ld. Ray. 552.

ant has a right to their shade and fruit; and a sufficient possession to maintain trespass against any party, either landlord or stranger, for cutting them down.¹ But when cut, they belong to the party who has the next estate of inheritance in the land, or the tenant for life without impeachment of waste (if there be one), and the tenant cannot bring trespass *de bonis asportatis* for carrying them away; such action must be brought by the owner of the next estate of inheritance, or tenant for life without impeachment of waste.² And if a stranger cut them down, both landlord and tenant, or party entitled to the trees subject to the lease, may each maintain an action against him for his respective loss, and the one action is no bar to the other.³ So a grantee of trees may maintain this action against the owner of the soil, for cutting them down;⁴ or a lessee for years, who, on the expiration of the tenancy, is, by the custom of the country, entitled to the away-going crop.⁵ And if a man lets a farm to be worked upon shares, the landlord may have this action against a stranger for treading down the corn;⁶ or the landlord and tenant may maintain a joint action.⁷

§ 775. An action on the case for damages is the proper remedy, wherever the plaintiff has merely a reversionary interest in the property, the possession being in another, for the erection of any kind of nuisance;⁸ or for not repairing a privy near to plaintiff's house; for not emptying a cesspool or sewer;⁹ for manufacturing candles, or erecting a forge;¹⁰ for undermining a house;¹¹ for obstructing the entrance to a house;¹² for not sustaining a sea-wall, whereby plaintiff's property was injured;¹³ for cutting down trees, to the shade of which the plaintiff was entitled, as occupant of the messuage; for keeping a slaughter-house near the plaintiff's house,

¹ *Pomfret v. Microft, supra.*

² *Evans v. Evans*, 2 Camp. 491; *Blackett v. Lowes*, 2 Maule & S. 499.

³ *Clerke v. Pywell*, 1 Saund. 819, e.

⁴ *Clap v. Draper*, 4 Mass. 266. A landlord cannot by wrongfully cutting down trees, during the term, acquire a right to them, so as to maintain trespass against the tenant for taking them away. *Chanon v. Patch*, 5 B. & C. 897. An assignment of a tree for house-bote by a bailiff pursuant to the terms of the lease, entitles the tenant to fell the tree, after the discharge of the bailiff. *Courtenay v. Fisher*, 4 Bing. 8. It is said that the property in trees is in the landlord, and the property in bushes in the tenant, even where they are

cut down by a stranger. *Berriman v. Peacock*, 9 Bing. 384.

⁵ *Stultz v. Dickey*, 5 Binn. 285.

⁶ *Bul. N. P.* 85; *Wilson v. Mackreth*, 8 Burr. 1824; *Co. Lit.* 4 b.

⁷ *Foote v. Colvin*, 8 Johns. 216.

⁸ *Reynolds v. Clarke*, 2 Ld. Ray. 1899.

⁹ *Russell v. Shenton*, 3 Q. B. 449.

¹⁰ *Bradley v. Gill*, 1 Lutw. 69.

¹¹ *Smith v. Martin*, 2 Saund. 397; *Bradbee v. Christ. Hosp.*, 2 Dowl. P. C. N. S. 164.

¹² *Taylor v. Cole*, 3 T. R. 292; *Cheetam v. Hampson*, 4 id. 818.

¹³ *Mayor v. Henley*, 1 Bing. N. C. 222; s. c. 8 B. & Ad. 77.

or erecting a building from which the water ran on plaintiff's house, whereby it was injured; for continuing an iron manufactory, and making noises and annoying the plaintiff in the occupation of his house;¹ or for excavating the defendant's ground too close to the foundations of the plaintiff's house (he having acquired a right to the support of the defendant's land), whereby its fall was accelerated.²

§ 776. Case is also the appropriate remedy for any disturbance, or other wrong, to incorporeal property; as of a franchise, or right of common; for the obstruction of a private way; the neglect to repair a way which the defendant was bound to keep repaired; or by a reversioner, for an injury done to his reversionary interest, by building thereon.³ Also for the disturbance of an easement, or privilege over another's land; or in a sink, gateway, or washing-place, in another's ground;⁴ or for obstructing the use of the door-bell, knocker, skylight, staircase, or water-closet, by a lodger in a house. A tenant may also render himself liable to his co-tenant for damages in this action, by obstructing him in the use of the premises.⁵

§ 777. Where a tenant under color of the law of fixtures, wrongfully severs from the freehold, articles put up by himself during the term, or which have been demised to him together with the premises, the landlord cannot, pending the lease, support an action against him for trespass *quare clausum fregit*.⁶ But where fixtures have been severed from the freehold, and reduced again to a chattel state, the party in whom the right of property is vested, from the time of severance, may support trespass *de bonis asportatis* for the removal, for the general property of personal chattels draws it to the possession. The reversioner may, therefore, sustain this action against a tenant in possession, pending a lease, for the removal of things which the tenant, either from the circumstance of their having been demised to him, or for any other reason, has no right to take away.⁷ Yet a tenant, after the severance of arti-

¹ *Elliotson v. Feetham*, 2 Bing. N. C. 184.

² *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dodd v. Holme*, 1 Ad. & E. 498; but see *Chadwick v. Trower*, 8 Scott, 1.

³ *Seneca R. R. v. Auburn R. R.*, 5 Hill, 170; *Mellor v. Spateman*, 1 Saund. 846, a; Com. Dig. Action on the Case, Disturbance, A. 2; *Coryton v. Letheby*, 2 Saund. 118; *Yard v. Ford*, *ib.* 172, a.

⁴ *Wilson v. Smith*, 10 Wend. 824; *Mainwaring v. Giles*, 5 B. & A. 861; *Hewlins v. Shippam*, 5 B. & C. 221.

⁵ *Underwood v. Burrows*, 7 C. & P. 26; *Browning v. Dalsome*, 3 Sandf. 13.

⁶ *Dyer*, 121; Co. Lit. § 71.

⁷ *Udal v. Udal*, *Aleyn*, 81; *Bowles's case*, 11 Co. 81; *Ward v. Andrews*, 2 Chit. 686; *Farrant v. Thompson*, 5 B. & A. 826.

cles to which he is not entitled as fixtures, cannot maintain trespass against his landlord, or a stranger, for removing them.¹ And if the tenant is entitled to emblements after the determination of his term, he may maintain trespass against his landlord for forcibly preventing his taking them away.² But a tenant who wrongfully continues in possession of the premises after the expiration of his term, although he does not abandon his right of property to the fixtures, is still liable to be sued in trespass *quare clausum fregit* if he enters to take them away, for his property in the fixtures does not give him a right of being upon the premises.³

§ 778. Any unlawful taking of, or injury to personal property, of a forcible nature, amounts to a trespass, even though the defendant had no intention of committing a trespass; for the injury forms the ground of action, the intention being wholly immaterial.⁴ And though the property is only taken for an instant, or the goods be restored, still the action lies, and the restoration of the goods only goes in mitigation of damages.⁵ It lies for injuries to all reclaimed animals, even those *feræ naturæ*; ⁶ as if a hare be taken or killed on the plaintiff's land, for while on his land he has a local property in it. But the action will not lie if it be driven off his land and killed, for his property in it is then determined, unless he immediately pursues it; in which case the immediate pursuit continues his local property, and it becomes unlawful for the party killing it to take it away.⁷

§ 779. Trespass *vi et armis* does not lie against a lessee for years, for cutting down timber-trees, and carrying them away, and selling them; but if after cutting them down he let them lie, and afterward carry them away, so that the taking and carrying away be not one continued act, but there is time for the property of the divided chattel to settle in the lessor trespass will lie.⁸ And the reason

¹ *Ib.*; *Evans v. Evans*, 2 Camp. 491.

² *Stewart v. Doughty*, 9 Johns. 108. If any person be disseised, ejected, or put out of any lands or tenements in a forcible manner, or, being put out, be afterwards holden and kept out by force, or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein treble the damages assessed by the jury, or by a justice of the peace, in cases provided by law. 2 R. & S. 2d ed. 262, § 4.

³ *Holmes v. Tremper*, 20 Johns. 82; *Penton v. Hobart*, 2 East, 88.

⁴ *Seneca R. R. v. Auburn R. R.*, *supra*;

Sanderson v. Baker, 2 W. Bl. 882; *Reeves v. Slater*, 7 B. & C. 486. As to what particular acts amount to a trespass, and what not, see *Hartley v. Moxham*, 8 Q. B. 401.

⁵ *Price v. Helyar*, 4 Bing. 597-604; *Bac. Abr. Trespass*, E. 669-674.

⁶ *Wright v. Ramscott*, 1 Saund. 84; *Grymes v. Schack*, Cro. Jac. 262; and see *Somerset v. Fogwell*, 5 B. & C. 879; per *Erskine, arg.*

⁷ *Ib.*; *Keble v. Hickringill*, 11 Mod. 75.

⁸ *Herlakenden's case*, 4 Co. 62; *Moor*, 248.

why he is not otherwise liable is, that he has a special property or interest in them for repairs and shade; and, therefore, if the trees be excepted in the lease, it will make him a trespasser equally with a lessee at will; and it will lie against tenant at will, because such acts determine the will; but against a tenant by sufferance the lessor cannot have trespass before entrance. And though trespass will lie against the lessee for years for cutting the trees where they are excepted in the lease, yet if he put in his cattle to feed, and they bark the trees, trespass will not lie.¹ It may also be observed, that if a person having a legal right of entry on land, enter by force, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass for damages, at the suit of the person who has no right, and is turned out of possession.² And where a tenant holds over his term, and the landlord enters by force and turns him out, he cannot maintain trespass against the landlord.³ But a party who has obtained possession by force has not a sufficient possession to maintain trespass against the owner for a removal of his goods off the land.⁴

§ 780. In trespass to personalty, it is essential that the plaintiff be in possession, or entitled to the immediate possession, of the property, at the time the trespass was committed; for it is a possessory action, and lies only in favor of the party who has such immediate right of possession. And if the right of possession at the time is in another, the plaintiff's interest is merely reversionary; and trespass will not, in general, lie by a reversioner.⁵ The general owner, who has an absolute property in chattels, may maintain trespass, though he has never had actual possession, if he be entitled to the immediate possession; because a general property in personalty gives a constructive possession. But if the general owner has given another a special property as against himself, he cannot maintain trespass, because he has no immediate right of possession.⁶ The plaintiff must also, at the time of the trespass,

¹ Co. Lit. 57; *Glenham v. Hanby*, 1 Ld. Ray. 789.

² *Erwin v. Olmsted*, 7 Cow. 229.

³ *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 18 *id.* 235; *ante*, §§ 531, 532.

⁴ *Brown v. Dawson*, 4 Per. & D. 355.

⁵ *Putnam v. Wylie*, 8 Johns. 432; *Smith v. Milles*, 1 T. R. 490; *Ward v. Macauley*, 4 *id.* 489; *Penton v. Robart*, 2 East, 88. When a reversioner sues for an injury to his reversion, he must show an injury so permanent in its nature as to

affect the value of his reversionary interest; for if the injury only affects the possessory interest, the party in possession should sue. *Bell v. Twentyman*, 1 Gale & D. 228; *Raine v. Alderson*, 6 Scott, 691. What amounts to such an injury, see *Tucker v. Newman*, 3 Per. & D. 14.

⁶ *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Mather v. Trinity Church*, 3 S. & R. 518; *Gordon v. Harper*, 7 T. R. 9; *Bertri v. Beaumont*, 16 East, 83; *Wilbraham v. Snow*, 2 Saund. 47, note a.

have been entitled to the exclusive possession as against the defendant, although the duration of his interest may be limited. Therefore one tenant in common, joint tenant, or parcener, cannot maintain trespass, but only case, against the other, for an abuse of the thing in common, as by holding exclusive possession thereof; but if he destroys it he may maintain trespass, as such destruction amounts to a severance of the tenancy.¹ The pulling down of a wall, however, by a tenant in common, in order to rebuild it, does not amount to a destruction if rebuilt.² And where the defendant hired a steamboat for an excursion to a certain place, the captain navigating her, it was held that the defendant had not such an exclusive possession of the boat as to justify him in forcibly turning out a stranger, whom the captain had allowed to come on board.³

§ 781. A similar rule prevails with regard to trespass upon realty. A right of property is not always required for this purpose, as actual possession is sufficient against any party who cannot show better title, or as against a mere wrong-doer.⁴ Thus a party in possession of lands under a mere parol license, or even an intruder thereon as against a wrong-doer, may maintain trespass.⁵ And a female servant has such a possession of her bedroom as will entitle her to maintain trespass against a person who wrongfully forces himself into it whilst she is there.⁶ So of a carpenter, in possession of premises to repair them.⁷ Trespass *quare clausum fregit* can only be maintained by the person who is in possession of the land, either actually or constructively, at the time the injury is done; a lessor, therefore, cannot maintain such action against a stranger, while there is a tenant in possession.⁸ But where a parson is put in possession by the landlord, merely to prevent the trespasses of others, the landlord may bring the action, notwithstanding such agent may have been allowed to cultivate part of the

¹ *Wilson v. Mackreth*, 8 Burr. 1824; *Voyce v. Voyce*, Gow. 201; *Wilbraham v. Snow*, *supra*, h; *Holliday v. Cammell*, 1 T. R. 658. Whoever has an exclusive right to the soil, as to grow a crop of wheat growing thereon, may maintain this action. *Austin v. Sawyer*, 9 Cow. 39.

² *Cubitt v. Porter*, 8 B. & C. 257.

³ *Dean v. Hogg*, 10 Bing. 345.

⁴ *Stuyvesant v. Dunham*, 9 Johns. 61; *Graham v. Peat*, 1 East, 246; *Catteris v. Cowper*, 4 Taunt. 547; *Harper v. Charlesworth*, 4 B. & C. 574.

⁵ *Harper v. Charlesworth*, *supra*.

⁶ *Lewis v. Ponsford*, 8 C. & P. 687.

⁷ *Hall v. Davis*, 2 C. & P. 33.

⁸ *Stuyvesant v. Tompkins*, 9 Johns. 61; *Wickham v. Freeman*, 12 Johns. 188; *Taylor v. Townsend*, 8 Mass. 415; *Shenk v. Mundorf*, 2 Browne, 106; *Addleman v. Way*, 4 Yeates, 218; *Cooke v. Thornton*, 6 Rand. 8; *Toby v. Reed*, 9 Conn. 216; *Root v. Chandler*, 10 Wend. 110; *Lienow v. Ritchie*, 8 Pick. 235.

land for himself.¹ Nor can the landlord sue an under-tenant in trespass, even for an injury done to the freehold.² An actual dispossession is not necessary, but any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is injured, is sufficient to maintain this action.³ But where a defendant, claiming a sum of money to be due to him from the plaintiff, his lodger, locked up plaintiff's goods in a room which he held of defendant, and in which the plaintiff had put them, kept the key, and refused plaintiff access to them, saying that nothing should be removed until defendant's bill was paid; the court held there was no such dispossession of the goods as would sustain an action of trespass.⁴ Where land is vacant, or the actual possession cannot be shown, the person having legal title will be deemed to be in possession, so as to maintain trespass; and the landlord of a tenant at will may bring trespass against him for any voluntary waste, because such injury would amount to a determination of the tenancy, and the landlord is entitled to possession.⁶

§ 782. A tenant for years may support trespass against a stranger, or even his landlord.⁷ But as to a tenant at will, or by sufferance, although he may maintain trespass against a wrong-doer, he cannot against his landlord, even if violently dispossessed; for an entry by the landlord determines his tenancy.⁸ Nor can a lessor have trespass against a sub-tenant of his lessee, for trespass committed during the term.⁹ But an interest in the profits of the soil is sufficient for the purposes of this action; as where a man purchases grass or other crop upon another's land, and a wrong-doer cuts and carries it away, trespass lies in favor of the purchaser, for the law holds him to be in possession.¹⁰ If the tenant has assigned all his interest in the crop to another, trespass should be brought in the name of the latter for the wrongful taking away such crop;¹¹ and he may maintain the action even against the owner of the land.¹² But where the owner or possessor of land works it on

¹ *Davis v. Clancy*, 8 McCord, 422.

² *Tobey v. Webster*, 8 Johns. 468.

³ *Allen v. Craig*, 10 Wend. 349.

⁴ *Hartley v. Moxham*, 3 Q. B. 701.

⁵ *Van Rensselaer v. Radcliff*, 10 Wend. 689; *Wickham v. Freeman*, 12 Johns. 188; *Kennedy v. Wheatly*, 2 Hayw. 402; *Hubbell v. Rochester*, 8 Cow. 115; *Revett v. Brown*, 5 Bing. 7.

⁶ *Suffern v. Townsend*, 9 Johns. 35; 4 Kent. Com. 118.

⁷ *Pomfret v. Ricroft*, 1 Saund. 322, note 5.

⁸ *Hyatt v. Wood*, 4 Johns. 150, 313; *Harper v. Charlesworth*, 4 B. & C. 574. *Ante*, §§ 581, 582.

⁹ 8 Johns. 468.

¹⁰ *Stewart v. Doughty*, 9 Johns. 108; *Crosby v. Wadsworth*, 6 East, 602; *Evans v. Roberts*, 6 B. & C. 829; *Blackett v. Lowes*, 2 Maule & S. 499.

¹¹ *Carter v. Jarvis*, 9 Johns. 148.

¹² *Wilber v. Paine*, 1 Ohio, 251.

shares with another, they are tenants in common of the crop, and must both sue for an injury done to it.¹ Merely clearing out a fishing-place in a public river does not give such a possession of it as will maintain trespass.²

§ 783. A disseisee may have trespass against a disseisor for the disseisin itself, because he was then in possession; but not for an injury after the disseisin, until he hath gained possession by re-entry, and then he may support this action for an intermediate damage.³ But it does not lie against a person coming in under the disseisor.⁴ So where the defendant is put into possession under a writ of restitution, on an indictment for a forcible entry against the plaintiff, and the proceedings are afterwards quashed and restitution awarded, the plaintiff may maintain trespass against the defendant, but not against a person acting under license from him.⁵ A person having a mere incorporeal right, as of common of pasture, cannot support trespass *quare clausum fregit*, for treading down the grass growing upon the land upon which he has such right of common; for though he has a right to pasture his cattle there, he has no exclusive right of possession to the land.⁶ But wherever an exclusive right exists, trespass will lie, though the party has not the absolute right to the soil, or the whole property therein.⁷ And though the possession must be exclusive, it need only be so to the extent of the trespass; for a party who has dedicated a street to the public may, notwithstanding, maintain trespass for any injury to the soil thereof, because he has the exclusive possession of the freehold.⁸ For injuries to real property incorporeal, as a franchise, right of way, or common, inasmuch as the property cannot be affected immediately or tangibly by any substance, no injury thereto can be considered as committed with force, and consequently trespass will not lie. For the same reason, trespass cannot be supported for a *non-feasance*, for where there has been no act there can be no force;⁹ and, therefore, *case* is the proper *remedy* for a mere detention of goods, without an unlawful

¹ *Fowler v. Colvin*, 3 Johns. 216; *Demott v. Hageman*, 3 Cow. 220.

² *Westfall v. Van Anker*, 12 Johns. 423.

³ *Tobey v. Webster*, 3 Johns. 471; 2 Rol. Abr. 553; *Dyer*, 985.

⁴ *Liford's case*, 11 Co. 46.

⁵ *Case v. Degoes*, 3 Caines, 261; *Wickman v. Freeman*, 12 Johns. 184.

⁶ *Stocks v. Booth*, 1 T. R. 428; 2 Rol. Abr. 522, N. pl. 8; *Bac. Abr. Trespass*, C.

8; *Wilson v. Mackreth*, 3 Burr. 1824; *Welden v. Bridgewater*, Cro. El. 421.

⁷ *Harker v. Birkbeck*, 3 Burr. 1563; *Wilson v. Mackreth*, *supra*; *Blackett v. Lowes*, 2 Maule & S. 499; *Stultz v. Dickey*, 5 Binn. 285.

⁸ *Lade v. Shephard*, 2 Stra. 1004; *Mayor v. Ward*, 1 Wils. 110.

⁹ *Reynolds v. Clarke*, 1 Stra. 686; *Turner v. Hawkins*, 1 B. & P. 476; *Shapcott v. Mugford*, 1 Ld. Ray. 188.

taking ; a neglect to repair the banks of a river, whereby the plaintiff's land was overflowed ; or a neglect to redeliver a beast distrained damage-feasant, when sufficient amends were tendered before the beast was impounded.¹

§ 784. With respect to the plaintiff's right or interest in the property affected, trespass is, as we have seen, an injury to the possession ; and unless, at the time the injury was committed, the plaintiff was in actual possession, the action of trespass *quare clausum fregit* cannot be maintained.² For this reason the landlord cannot, during a subsisting lease, support trespass, but the action must be in the name of the tenant,³ or the landlord must proceed in case, as a reversioner ; unless the injury was committed to trees, or other property excepted in the lease, or the trees were severed and carried away, when the latter may support trespass for cutting and carrying away the same.⁴ So if land be granted to A., with a reservation of all mill-seats, and the grantor permits B. to enter and erect a mill, the entry of B. and the erection of a mill is a severance of the freehold, and renders the mill a distinct close ; and B. may maintain trespass against A. for pulling down the mill.⁵ But the mere occupation by a servant of premises, he paying no rent, is to be considered the possession of the employer, who may declare as on his own possession.⁶ A party may sue for the continuance of a nuisance, though erected before he was possessed of the property in respect of which he sues.⁷ It lies against either the party who erected it, even though he has no right to enter upon the land to abate it, or the occupier who continues it, because every continuance of it is a fresh nuisance.⁸ In general, the owner is not liable, as such, for a nuisance, being a mere non-feasance, but he may be liable as the original erector ; and if he demised the land after erecting a nuisance, he is liable for the continuance of it, though out of possession as the demise affirms it.⁹

¹ *Seneca R. R. v. Auburn R. R.*, 5 Hill, 170 ; *Wilbraham v. Snow*, 2 Saund. 47, k ; *Six Carpenters' case*, 8 Co. 146 ; *F. N. B.* 98.

² *Stuyvesant v. Tompkins*, 9 Johns. 61 ; *Wickham v. Freeman*, 12 Johns. 183 ; *Addleman v. Way*, 4 Yeates, 218 ; *Mather v. Trinity Church*, 3 S. & R. 514 ; *Allen v. Thayer*, 17 Mass. 299.

³ *Campbell v. Arnold*, 1 Johns. 511 ; *Tobey v. Webster*, 3 *id.* 468 ; *Catlin v. Hayden*, 1 Vt. 375.

⁴ *Pomfret v. Ricroft*, 1 Saund. 322, n.

⁵ *Gordon v. Harper*, 7 T. R. 13 ; *Goodright v. Vivian*, 8 East, 190 ; *Wyndham v. Way*, 4 Taunt. 816 ; *Ward v. Andrews*, 2 Chit. 636 ; *Baxter v. Taylor*, 1 Nev. & M. 11.

⁶ *Van Rensselaer v. Van Rensselaer*, 9 Johns. 377 ; *Jackson v. Buel*, *ib.* 299.

⁷ *Beatri v. Beaumont*, 16 East, 33-36 ; *Ball v. Cullimore*, 1 Gale, 96.

⁸ *Thompson v. Gibson*, 7 M. & W. 456.

⁹ *ib.* ; *Fenruddock's case*, 5 Co. 101, a.

¹⁰ *Rex v. Pedley*, 1 Ad. & E. 822 ; *Payne v. Rogers*, 2 H. Bl. 849.

But the owner, though not in possession, is liable for a nuisance arising from non-repair, when he is by covenant the party to repair; if otherwise, the occupant is the party liable.¹ And so the landlord is liable if he lets premises, the natural consequence of the regular use of which is, that they will become a nuisance unless attended to.²

§ 785. If a party having title enters upon land, or takes possession, he may treat as trespassers all those who afterwards come upon it;³ or who, having unlawfully taken possession in the first instance, wrongfully continue on the land. As where a remainder-man entered upon a party in possession by intrusion, it was held that trespass lay by the remainder-man against the intruder.⁴ The English books draw a distinction between personal and real property, as to the owner's right of action. With regard to the former, they hold, as we have seen, that the general property draws to it the possession sufficient to enable the owner to support trespass, though he has never been in possession;⁵ but, as to real property, there is no such constructive possession; and unless the plaintiff has the actual possession, by himself or servant, at the time the injury was committed, he cannot support the action.⁶ But in this country we have carried the principle, as to real property, further than has been done in England; and we allow the owner to maintain trespass without an actual entry, on the principle that possession follows the ownership, unless there be an adverse possession.⁷ The right of action for a trespass is, at common law, strictly personal, and does not survive against the personal representatives of the deceased trespasser; though if his estate has been benefited by the trespass, it may be made responsible to that extent in another form of action. But the Revised Statutes of

¹ *Cheetham v. Hampson*, 4 T. R. 318; *Payne v. Rogers*, *supra*.

² *King v. Pedley*, *supra*; 1 Ad. & E. 822.

³ *Hey v. Moorhouse*, 8 Scott, 156.

⁴ *Butcher v. Butcher*, 7 B. & C. 899.

⁵ *Wilbraham v. Snow*, *supra*; Bul. N. P. 38; *ante*, 884.

⁶ *Beatie v. Beaumont*, 16 East, 38; Bac. Abr. Trespass, C. 3.

⁷ *Van Brunt v. Schenck*, 11 Johns. 385; *Wickham v. Foreman*, 12 Johns. 184; *Bush v. Bradley*, 4 Day, 306; *Lunt v. Brown*, 18 Me. 286; *Rowland v. Rowland*, 8 Ohio, 40; *Anderson v. Nesmith*, 7 N. H. 167. For all purposes of the remedy, the law annexes a constructive possession to the right of possession; and where

the owner, having been ousted for a time, is by entry or ejectment, finally restored, the law adjudges his possession never to have been discontinued. *Jackson v. Sellick*, 8 Johns. 270; *Davis v. Clancy*, 3 McCord, 422; *Peareson v. Dansby*, 2 Hill (S. C.), 466; *Prop'r's. v. Call*, 1 Mass. 488; *Kennedy v. Wheatly*, 2 Hayw. 402; *Smith v. Wilson*, 1 Dev. & B. 40. If he shows a right of possession at the time the defendant went in, it is a right which continues to the time of the recovery and re-entry, and he is then considered as having been in possession according to his right. *Dewey v. Osborn*, 4 Cow. 329; *Morgan v. Varick*, 8 Wend. 587; *Leland v. Tousey*, 6 Hill, 828.

New York authorize this action to be brought against the executor or administrator of any testator or intestate, who, in his lifetime, shall have wasted, destroyed, or carried away the chattels of any such person, or committed any trespass on the real estate of any such person.

CHAPTER XVI.

OF FORCIBLE ENTRY AND DETAINER.

§ 786. A FORCIBLE entry and detainer consists in violently taking or keeping possession of lands or tenements, by force or with threats, and without authority of law. The exercise of this privilege was, at common law, allowed to every person disseised of his lands, unless an entry had been taken away, or barred, by his neglect to enter in due time. But this licentious course of procedure, by giving an opportunity to powerful men, under the pretence of feigned titles, to eject their weaker neighbors, or by force to retain a wrongful possession, was found to be so prejudicial to the public peace, that it became necessary to restrain men from the use of all violent methods of doing themselves justice. The Revised Statutes of New York, corresponding substantially with those of the other States, as well as with the old prohibitory English statutes, declare, "that no entry shall be made into any lands or other possessions, but in cases where an entry is given by law; and in such cases only in a peaceable manner, and not with strong hand, nor with multitude of people." The statutes then proceed to punish any violation of the law by imprisonment, as for a public offence; and at the same time to restore to the aggrieved person the possession of the premises from which he had been forcibly ejected or detained. The proceedings were originally in the form of a criminal prosecution, and an indictment will still lie at common law; but by the gradual addition to the statute of provisions looking to the restitution of the property, the remedy has become a private rather than a public one, although the form of the proceeding, and the rules of law which govern it, remain to a great degree unchanged.¹

§ 787. To make *an entry* forcible there must be such acts of violence used, or such threats, menaces, or gestures exhibited, as

¹ 2 N. Y. R. S. 507, § 1; 2 Ed. III.; 8 Hen. VI. ch. 9; 81 Eliz. ch. 11. The Statutes of Massachusetts, ch. 104, § 2, and of other New-England States, extend the application of this act to all tenants who hold over after a determination of the lease, either by its own limitation, or by a notice to quit.

give reason to apprehend personal injury or danger in standing in defence of the possession. If there is no other force made use of than is necessarily implied in every mere trespass, the case is not within the statute; and therefore the breaking of the lock of an outer door is not in itself sufficient to sustain a complaint of this description.¹ The same circumstances of violence or terror, which make an *entry* forcible, will make a *detainer* forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, will be adjudged guilty of a forcible detainer, though no attempt be made to re-enter.² The mere act of nailing up the door of a house does not amount to retaining a forcible possession.³ Any person, however, claiming to have a right of entry into lands may freely exercise that right, provided he commits no such acts of violence as will subject him to a criminal prosecution.⁴ For this reason, a warrant will not lie for forcibly taking possession of a ferry, with the adjacent banks and shores of the river, where the party taking possession has a right of ferry established; for a ferry is an incorporeal right, upon which no forcible entry can in fact be made; nor can the sheriff, in case of a judgment of restitution, deliver possession of a ferry.⁵ But it is

¹ Willard v. Warren, 17 Wend. 257, where the doctrine of forcible entry is elaborately discussed by Judge Cowen; Rex v. Storr, 8 Burr. 1702; Pennsylvania v. Robison, Addis. 14; Commonwealth v. Dudley, 10 Mass. 408; Same v. Shattuck, 4 Cush. 143; Rex v. Wilson, 8 T. R. 357. Proceedings under these acts should be discouraged unless the party charged has been guilty of an evident force. Respublica v. Devore, 1 Yeates, 501. To constitute a forcible entry or a forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of persons and *show* of force as is calculated to deter the rightful owner from sending such persons away, and resuming his own possession. Milner v. McClean, 2 C. & P. 17. So an indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least such show of force, as is calculated to prevent any resistance. Rex v. Smyth, 5 C. & P. 201; where four men entered a building occupied by another, at night, and avowed their intention to keep possession, it was held to be sufficient evidence of force. Scarlet v. Lamarque, 5 Cal. 63.

But the necessity of actual force has been much modified both by the language of statutes and the interpretation of courts. Thus, in Illinois, entry by force, mentioned and prohibited in the statute, has been held to mean merely entry without consent; Croff v. Ballinger, 18 Ill. 200; or a clandestine entry; Baker v. Hays, 28 id. 387; or an entry by collusion with the lessee; McCartney v. Hunt, 16 id. 76. So in Michigan, an "entry by stealth or stratagem" has been held within the statute against "force;" Lutz v. Miles, 16 Mich. 456. In Missouri, an entry "against the will of the occupant" has been held to be forcible; Dennison v. Smith, 26 Mo. 487; and the same is the rule in Kentucky by statute; Code, § 500. On the other hand, it is held in Connecticut that actual force is requisite, and cannot be implied; Gray v. Finch, 28 Conn. 495.

² The People v. Rickert, 8 Cow. 226; Commonwealth v. Dudley, *supra*.

³ Hopkins v. Buck, 3 A. K. Marsh. 110.

⁴ Langdon v. Potter, 8 Mass. 215; State v. Johnson, 1 Dev. & B. 824; The People v. Smith, 24 Barb. 16; and see *ante*, § 524, note.

⁵ Rees v. Lawless, 6 Litt. 184.

no excuse that the accused entered upon the premises to make a distress; or to enforce a lawful claim; nor that he was already in the house, or that, having entered by force, possession was ultimately obtained by entreaty.¹ The offence may also be committed by a lessee, who forcibly maintains possession when his term has expired; by a mortgagor, after the forfeiture of the mortgage in cases where the common-law doctrine of mortgage prevails; by the *feoffee* of a disseisor, after entry or claim of the party disseised; or by a tenant, when he forcibly resists a distress for rent.²

§ 788. If the tenancy of a house has terminated, and the tenant has promised to leave on a particular day, but does not, the landlord is not justified in putting him out by force; but if, the tenancy being ended, the tenant has left the house with his family and furniture, and locked it up, the landlord may break in and obtain possession, without violating the statute.³ If, however, after the expiration of the term, the tenant remains in possession of only a single apartment of the house; or if, after notice to quit, he abandons the house and locks it up, leaving some articles of furniture in it, the landlord is not justified, in either case, forcibly to assert his right of possession, and, if he attempts to do so, will render himself liable to an indictment for a forcible entry.⁴ The representative character, with which a person happens to be clothed, will not shield him from the consequences of his forcible acts. And if the trustees of a church who are, *virtute officii*, lawfully seised of the ground and buildings belonging thereto, close its doors against the minister and congregation, who break and enter the church by force, an indictment, or proceeding, for a forcible entry, at the instance of the trustees, will lie against them, for the forcible entry. Having the key of the church is *prima facie* evidence of possession, but does not preclude an inquiry into the fact, who are the legal trustees, and have the right of possession.⁵

¹ Com. Dig. Forcible Entry, A. 2; 8 T. R. 361.

² Com. Dig. Justices, B. 1. In those States where this remedy is confined to controversies between landlord and tenant, it is necessary that this relation shall appear in some form on the warrant. *Powers v. Sutherland*, 1 Duval, 151. *Goldsberry v. Bishop*, 2 *id.* 143; *Dunne v. Trustees*, 39 Ill. 578.

³ *Hillary v. Gay*, 6 C. & P. 284. See *ante*, §§ 523, 581, 582, 706.

⁴ *Newton v. Harland*, 1 M. & G. 644; *Darrell v. Johnson*, 17 Pick. 268; *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158. See *Hillary v. Gay*, *supra*.

⁵ *People v. Runkle*, 9 Johns. 147; s. c. 8 *id.* 464. When a church or other corporation institutes a proceeding of this character, it must be in the corporate name, and not in the individual names of the trustees. *The People v. Fulton*, 11 N. Y. 94.

§ 789. By the New York statute, the complaint may be made by any person having an estate of freehold, or for a term for years, in the premises then subsisting, or some other right to the possession thereof, stating the same. The construction given to the English statutes on this subject narrowed the remedy to cases where the relator was seised of an estate of freehold or for a term of years,¹ and the consequence was, that in every other instance of a forcible entry or detainer, so far as this remedy was concerned, the wrongdoer, although he entered by force and without right, was preferred to the quiet occupant thus dispossessed; for if the former could show on the traverse that the latter had no estate within the purview of these acts, as thus construed by the courts, he was entitled to a verdict. But it will be perceived our statute extends the remedy to *any other right of possession*; under which it has been held, that any person in the actual and peaceable possession of lands, at the time of a forcible entry, or in the *constructive possession*, at the time of a forcible holding out, is entitled to proceed under the statute, although he is neither seised of a *freehold*, nor possessed of a *term of years* in the premises.² But unless there is possession in another at the time of entry, whatever be the degree of force, the entry is not an offence of the character of which we are treating.³ A person, however, may have had possession constructively, when he was never, in fact, upon the land; and whether he had such possession or not is always a question for the jury.⁴ But a mere trespasser, or intruder, cannot institute proceedings under this statute, and be restored to the possession of that which he held unlawfully; for the legislature only intended to extend this remedy to such persons as have a lawful right of possession.⁵

¹ 15 Rich. II. c. 8; 81 Eliz. c. 11; 21 Jac. I. c. 15; 1 Hawk. P. C. C. 64, note.

² *People v. Van Nostrand*, 9 Wend. 50. This proceeding may be taken only by the person whose possession is invaded, and does not pass to his assignee, the object of the statute being to give a summary remedy to one who has been forcibly dispossessed, without reference to his title or to his right of possession. *Dudley v. Lee*, 39 Ill. R. 339.

³ *Pennsylvania v. Waddle*, Addis. 43; *Same v. Lemmon*, *ib.* 815; *Same v. Leach*, *ib.* 855; *Mairs v. Sparks*, 2 South. 513. The possession of a tenant at will is not the possession of the lessor, so as to enable him to maintain

his proceeding against a third person for expelling the tenant. *Commonwealth v. Bigelow*, 8 Pick. 81; *Bennet v. Montgomery*, 3 Halst. 49.

⁴ *Chiles v. Stephens*, 8 A. K. Marsh. 840.

⁵ "A complainant is now entitled to restitution if he has any right to possession. A mere intruder or trespasser cannot institute proceedings, or be restored to a possession which he held unlawfully; but every person lawfully in possession and forcibly excluded from such possession, is entitled to the benefit of the statute. An estate at will is an interest recognized by law, and is of value to the tenant; for though he holds during the

§ 790. The complainant, in those States where the English statutes have been adopted, must allege that he was seised in fee, for life, or for a term of years, and that he was turned out of possession by strong hand, or held out of possession in the same manner.¹ Consequently, if the under-tenant is disseised, he is the only person entitled to make the complaint.² The complainant's interest should be truly stated; but if a lawful possession is averred, it is enough, unless a want of precision in the statement should be objected to, before the taking of the inquisition before the judge. But since the enactment of the Revised Statutes in New York, it is no longer necessary in that State for the complainant to aver, that he was seised of a freehold, or possessed of a term of years, for mere possession is sufficient. Accordingly an affidavit that the complainant was lawfully and peaceably possessed of the premises in question, as tenant thereof, under the executors of A. B., deceased, who was the owner of the same, without setting forth the nature of the estate by virtue of which such possession was held, was deemed sufficient

pleasure of the lessee, yet when his estate is so determined, he is entitled to the emoluments, and for the purpose of bringing an ejectment, is considered a tenant from year to year; and he may therefore maintain these proceedings." Per Savage, C. J., in *People v. Reed*, 11 Wend. 157. So the rule that actual possession is all that the complainant is required to show has been adopted in California. Comp. Laws, 1853, c. 38, § 9; Missouri Rev. Code, 1845, p. 517; *Reed v. Holland*, 11 Mo. 605; *Dennison v. Smith*, 26 *id.* 487; so in *Krevet v. Meyer*, 24 *id.* 107; *Beeler v. Cardwell*, 33 *id.* 84; "lawfully possessed," was held to mean only "peacefully possessed." In Iowa, Code § 2362, *Langworthy v. Meyers*, 4 Iowa, 18, "possession in fact" is sufficient; while in Virginia, "possession sufficient to maintain trespass" is alone requisite; *Olinger v. Shepherd*, 12 Gratt. 462. Such possession was held sufficiently proved *prima facie* by evidence of title at a prior date; *Hale v. Wiggins*, 83 Conn. 101. But this doctrine of the sufficiency of mere possession seems to have been carried too far in some States, and it is held that the plaintiff may recover if in actual possession, no matter how acquired; *King v. St. Louis G. L. Co.*, 84 Mo. 34; or if he were a trespasser and defendant the legal owner; *Lorimer v. Lewis, Morris*, 258. However sound this may be, the law is certainly otherwise where recovery is limited by statute to the party "entitled to the premises," as in *Massachusetts*.

Gen. Stat. p. 137, § 2; *Indiana*, 2 *Gavin & H. Stat.* p. 632, § 12, and the party recovering must show a possession acquired under claim of title, even if invalid.

¹ 1 *Hawk. P. C.* 274; *Commonwealth v. Dudley*, 10 *Mass.* 403; *People v. Runkle*, 8 *Johns.* 464; *Rex v. Wilson*, 8 *T. R.* 357.

² *Yoder v. Eassey*, 2 *Dana*, 245. According to the California cases, the plaintiff must have been in actual possession. *Preston v. Kehoe*, 15 *Cal.* 315. So *Phelps v. Baldwin*, 17 *Conn.* 209; *M'Cartney v. M'Mullen*, 88 *Ill.* 287; *Spurck v. Forsyth*, 40 *id.* 488. He must have been in peaceable possession at the time of the entry; and a lessor cannot maintain the proceeding for an unlawful entry upon the possession of his tenant. *Treat v. Stuart*, 5 *Cal.* 118. In *Jarvis v. Hamilton*, 16 *Wisc.* 574, *Spurck v. Forsyth*, *supra*, it was held sufficient actual possession that plaintiff, though he did not reside on the premises, owned and improved them; and that they furnished "visible tokens of occupancy, such as fences, buildings, and cultivation." So possession of part of the premises, with a claim on the whole; *Hardisty v. Glenn*, 32 *Ill.* 62, or possession by keeping goods on the premises, were held sufficient; *Wall v. Goodenough*, 16 *id.* 417; *Baker v. Hayes*, 23 *id.* 337; while in *Warren v. Ritter*, 11 *Mo.* 364, the legal possession of a lessor after expiry of the lease, was held to suffice as against a mere intruder.

within the provisions of the statute, even upon an objection taken that the complainant was a mere tenant at will.¹ It is of no importance whether the seisin be by right or by wrong, nor whether the term of years be legal or not.² But a man who was neither in possession, nor had title at the time the entry was made, cannot, by subsequent purchase, acquire a right to institute this proceeding.³ It is only necessary to set forth a general description of the land;⁴ but the description must be sufficient to afford a guide to the sheriff, in executing the writ of restitution.⁵

§ 791. The complaint must be presented in writing, accompanied by an affidavit of the facts which justify the proceeding, to any of the authorities authorized to issue process, to dispossess a tenant by summary proceedings; upon which the justice will issue a precept to the sheriff, or a constable, of the county, requiring him to summon a jury to inquire of such forcible entry or detainer; and, at the same time, will notify the person against whom the complaint is made of the issuing of such precept, and of the time and place of the return thereof.⁶ At the time and place appointed for the return of the precept, the jury will make inquiry under oath, and deliver the same to the judge. And the magistrate has no authority to try the issue without a jury, although neither party should require it.⁷ The defendant is entitled to produce witnesses before the jury of inquiry, to cross-examine the complainants' witnesses, and to sum up the evidence to the jury.⁸ The only ques-

¹ *People v. Reed*, 11 Wend. 157; *People v. Van Nostrand*, *supra*. See Appendix, No. XXVI.

² *People v. Leonard*, 11 Johns. 504; *State v. Pearson*, 2 N. H. 550; *Mairs v. Sparks*, 2 South. 518; *Respublica v. Devore*, 1 Yeates, 501.

³ *Lewis v. Stidle*, 2 Litt. 294; *Gray v. Gray*, 8 *id.* 465. In New Jersey, the nature of the estate of the party aggrieved must be stated in the complaint. *Wall v. Hunt*, 4 Halst. 87. But the defendant is not allowed to show that the complainant has a different estate in the premises from that which he avers in the complaint. *Allen v. Smith*, 7 Halst. 199.

⁴ *Moore v. Massie*, 5 Litt. 296.

⁵ *Murphy v. Lucas*, 2 Ohio, 255; *Banks v. Murray*, 2 South. 849.

⁶ For a precedent of the complaint and subsequent proceedings, see Appendix, No. XXVI.

⁷ *Benjamin v. Benjamin*, 5 N. Y. 383. The Revised Statutes of New York do not appear to have repealed the act to prevent

forcible entries and detainers, passed in 1788; by which any justice of the peace, upon complaint made to him of a forcible entry is required to take with him sufficient power of the county, and go to the place where such force is made; and if he finds the place so forcibly held, after such entry made, to record such force, and there set a fine upon each of the offenders, and imprison him in the county jail until the fine is paid. But where a justice acts thus in his own view, without any inquiry by a jury, we can only punish the party guilty of the force, but cannot restore the possession; and if he orders or permits a restitution of possession, it is irregular. *Matter of Shotwell*, 10 Johns. 304.

⁸ *People v. Reed*, 9 Wend. 157; 2 R. S. 509. In *McCauley v. Weller*, 12 Cal. 500, Terry, C. J., says, "This is a summary proceeding to recover the possession of premises forcibly seized or unlawfully detained. The inquiry is confined to the actual peaceable possession of

tions to be tried at this stage of the proceeding are, the previous actual possession of the complainant, and the forcible character of obtaining or holding possession, and not the right of possession. The proof of the complainants' estate is to be made before the magistrate when the complaint is preferred, and the statute nowhere authorizes the jury to investigate the title, or the right of possession of either party.¹ If, by the inquisition, it shall be found that a forcible entry has been made, or, that the entry being peaceable, possession was forcibly kept; and the defendant does not traverse the inquisition within twenty-four hours after it is found, the officer must award restitution of the premises, assess the costs and expenses of the proceedings, and issue a precept to the constable, directing him to reinstate the complainant in his possession. But after the finding of such an inquest, the party complained against may traverse the inquisition in writing, denying such forcible entry, or forcible holding out, or alleging that he, or his ancestors, or those whose estate he has in such lands, have been in quiet possession for three years previous, and that his interest is not terminated; and upon paying the fees of the inquisition, the traverse will stay all further proceedings until it can be tried. The landlord of the party complained against may also become the traverser upon the same terms. A jury of twelve men is then summoned to try the traverse in the same manner, as provided by law, in civil actions before a justice of the peace. On the trial of the traverse, the party making the complaint will only be required to show, in addition to the forcible entry or detainer complained of, that he was in actual and peaceable possession, at the time of the forcible entry, or was in the constructive possession of the premises at the time of the forcible holding out. And the only defences allowed to the traverser are, a denial of the forcible entry or detainer; or that he, or his ancestor, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of three whole years together, next before the trial, and that his interest therein is not then ended or determined.²

the plaintiff, and the unlawful or forcible ouster or detention by the defendant; the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title cannot arise; a forcible entry upon the actual possession of the plaintiff being shown, he is entitled to res-

titution, though the fee-simple title and present right of possession are shown to be in the defendant."

¹ *Carter v. Newbold*, 7 How. Pr. R. 166.
² 2 R. S. 509, § 4-11; *People v. Leonard*, 11 Johns. 506; *Gray v. Nesbet*, 2 A. K. Marsh. 85; *Singleton v. Finley*, 1 Port. 144.

§ 792. In general, the title of the relator is not to be investigated in a proceeding of this nature, but he is still bound to set forth his title so far as to show himself within the provisions of the statute; and to this extent the title of the relator may be controverted by the defendant. But the defendant cannot set up his own title as a substantive matter of defence; and if he considers his claim to be paramount to that of the relator, he must resort to the remedy of ejectment to maintain his rights.¹ In a case before referred to, and which arose under the New York statute, it was objected by the defendant, that as the indictment alleged a possession in fee-simple in the relator, the complainant was bound to show such an estate on the trial. But the court held that the nature of the estate was quite immaterial; that possession was sufficient, and that any allegation of the estate, in addition to possession, might be rejected as surplusage, or was sufficiently proved by evidence of possession.²

§ 793. If the defendant is found guilty upon the traverse, the judge awards restitution of the premises which have been forcibly entered or forcibly held out, with the costs and expenses of the proceeding; and the sheriff or constable is thereupon directed to cause the complainant to be restored to, and put in, full possession of the premises.³ The proceedings for a restitution of the premises may be removed by *certiorari*, when allowed by a justice of the supreme court, after an inquisition found,⁴ and upon giving a bond with sureties to the complainant, to abide by the final order of the court,

¹ *People v. Rickett*, *supra*; *People v. Godfrey*, 1 Hall, 240; *People v. Nelson*, 13 Johns. 40; *Respublica v. Shryber*, 1 Dall. 68; *Chiles v. Stephens*, 3 A. K. Marsh. 344; *Dutton v. Tracy*, 4 Conn. 79; *Lecatt v. Stewart*, 2 Stew. 474. See *ante*, § 728 a, note, § 9, cases and statutes cited as to how far title is in issue in this proceeding. In *White v. Bailey*, 14 Conn. 271, a lessor who had assigned was held entitled to recover in this process, notwithstanding the assignment.

² *People v. Van Nostrand*, 9 Wend. 50. The court here say, "It is objected by the defendant, that, as the indictment alleges a possession in fee-simple in the relator, the complainant was bound to show such an estate on the trial. Under the Revised Statutes, the nature of the estate has become immaterial; possession is sufficient; and I apprehend the allegation of the estate, in addition to the possession, may be rejected as surplusage. But if it was necessary to establish the fact, as al-

leged in the indictment, the proof of possession was evidence of it, 11 Johns. 510, and the defendant is not at liberty to rebut the inference drawn from such evidence, by showing the kind of estate which the complainant has in the premises." The only defence allowed to the defendant on the traverse is, 1st. The denial of the forcible entry or, forcible holding out; or, 2d. Showing that he, or his ancestors, or those whose estate he has, have been in the quiet possession of the premises three whole years together, next before the inquisition found, and that his interest is not ended or determined. And the court refused to permit the defendant to traverse the complainant's title. See *People v. Godfrey*, 1 Hall, 240; *People v. Nelson*, 13 Johns. 340.

³ 2 R. S. 509, § 12, 18. The statutes of Illinois and Indiana require that all the jury should sign the verdict. *Bloom v. Goodner*, Breese, 35; *Test v. Devers*, 2 Blackf. 80.

⁴ *Haines v. Backus*, 4 Wend. 218.

and to pay any costs that may be awarded.¹ And where the proceedings have been so removed, and the issue ordered to be tried at the circuit, judgment as in case of nonsuit will be granted, as in other actions, if the relator does not proceed to trial.² These proceedings may be quashed on motion founded on affidavits for irregularity, and a re-restitution awarded;³ and it is not too late to make the motion after the inquisition has been traversed by the defendant.⁴ They may also be quashed for the same reason, when brought before the court on *certiorari*.⁵ The unsuccessful party, upon the *certiorari*, may appeal to the court of appeals; and the proceedings, as well as the costs, are regulated by the Code of Procedure, and are substantially the same, as on appeals from judgments in civil actions.⁶ In addition to the civil remedies above stated, an action of trespass may be maintained by the party ejected, or kept out; and if successful, the statute provides that he shall recover treble the damages assessed by the jury, or by a justice of the peace, in cases provided by law. And in such an action it is not necessary to show that the defendant has been convicted under the statute of forcible entry and detainer.⁷

§ 794. An indictment may also be supported at common law for a forcible entry or detainer; but to justify an indictment, the entry must appear to have been accompanied by a public breach of the peace.⁸ To an indictment, the defendant has been allowed to plead three years' possession; or he may traverse the force:⁹ and although he cannot justify the force, by showing title in himself, he may controvert the facts by which the prosecutor attempts to show his title, for the purpose of showing that the prosecutor has not such an estate as would entitle him to maintain a complaint under the statute.¹⁰ Upon a conviction of the prisoner,

¹ 2 R. S. 511, § 20.

² *People v. Hickox*, 8 Hill, 446.

³ *Matter of Shotwell*, 10 Johns. 804, 18 *id.* 158.

⁴ *People v. Wilson*, 18 How. Pr. R. 446.

⁵ *People v. Smith*, 24 Barb. 16.

⁶ Code of Procedure, § 11; *Hyatt v. Seeley*, 11 N. Y. 52; *ib.* 94; *ib.* 276; *People v. Sturtevant*, 8 Duer, 616.

⁷ *Willard v. Watson*, 17 Wend. 257. In such an action the defendant would be entitled to a verdict, if he shows title in himself, however punishable he may be criminally for the force used. *Ib.*

⁸ *Rex v. Nichols*, 1 Ld. Kenyon, 512; *Rex v. Wilson*, 8 T. R. 380; *Rex v. Lloyd*, Cald. 415; *Commonwealth v. Shattuck*, 4 Cush. 141.

⁹ *Rex v. Harris*, 1 Ld. Ray. 440. The indictment must set forth a seisin or possession within the purview of the act, and whether the estate of the testator be a freehold, or a term of years; and, on the traverse, the allegations as to his estate must be proved by the prosecutor. The *People v. Nelson*, 18 Johns. 840. It will be sufficient to state the injury with such certainty as will enable the court to award restitution; and any variance not essential in the name of a person, or in the description of the corporation injured, will not vitiate the proceedings. *People v. Runkle*, 9 Johns. 147.

¹⁰ *People v. Rickert*, 8 Cow. 228; *People v. Nelson*, *supra*; *People v. Van Nostrand*, *supra*. In *The People v. Nelson*,

for either a forcible entry or detainer, the court will not only punish the offender by fine or imprisonment, under the statute, but will also award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding is authorized to do, upon a verdict rendered before him.¹

the defendant offered, but was not allowed, to prove that he purchased the premises at a sheriff's sale, on an execution against the prosecutor, and that his entry was on that title.

¹ 2 R. S. 511, § 28; Hawk. b. 1, c. 64, § 45; Ford's case, Cro. Jac. 151; Simmons' case, Aleyn, 50; People v. Anthony, 4 Johns. 198; People v. Rickert, *supra*.

APPENDIX.

NO. I.

Agreement for a Lease.

Memorandum of an agreement made the — day of —, 18 —, between A. B. [*intended lessor*], of —, of the one part; and C. D. [*intended lessee*], of —, of the other part.

The said A. B. agrees to grant, and the said C. D. to take, a lease, by indenture, of all that messuage, &c.,¹ with the appurtenances, for the term of — years, to commence and be computed from the — day of — last, at the yearly rent of —, to be paid half yearly, on the — day of —, and the — day of — without any deduction or abatement on any account whatsoever; the first half-yearly payment thereof to become due and be made on the — day of — next. And it is hereby declared and agreed that in such lease, when granted, shall be contained the following covenants, that is to say: [*Here set out the covenants intended to be comprised in the lease.*]²

Parcels.

Term.

Rent.

Lease to contain covenants.

Witness,

A. B.

C. D.

¹ The words "messuage," or "tenement," or "premises," are used throughout these forms; but it is unnecessary to say that the parcels, varying as they must do, should be referred to by appropriate terms. When once described, they may, in general, be referred to by the single word *premises*.

² In framing agreements for leases, the best plan is to set out in *extenso*, the several provisions which the lease itself is to contain; but as this is often objected to, on the

ground of expense, the provisions are sometimes referred to in concise terms (as the lessee to covenant to pay rent and taxes, to repair, to insure, &c.), and left to expansion at a future day, according to the supposed intention of the parties; a course of proceeding generally leading to dispute, and not unfrequently to litigation, and for this reason an agreement, stipulating for the insertion of *all usual covenants*, or *all proper covenants*, or the like, should be avoided.

NO. II.

Terms for Letting a Farm.

Terms of an agreement between A. B. and C. D. for letting a farm in the town of —, in the county of Somerset, in the State of New Jersey, known as the Bellevue Farm.

- | | |
|------------------|--|
| Term. | 1. Term to be five years, to be computed from the — day of —, and so to continue until the landlord, or his agent, or the tenant, shall give six calendar months' notice in writing, to the other to determine the tenancy on the — day of — next following the day of the date of such notice. |
| Rent. | 2. Rent to be \$— per annum, to commence on the — day of — next, and to be paid quarterly on the — day of —, the — day of —, the — day of —, and the — day of —, and to be paid by equal portions; the first payment thereof to be made on the — day of — next. |
| Reservations. | 3. The landlord reserves to himself all trees, woods, underwoods, and saplings, with liberty at all seasonable times, of ingress, egress, and regress, for himself or servants, agents, and workmen, with or without horses and carriages, on any and every part of the premises, for the purpose of cutting down and carrying away the same, and also to view the state of repair of the said premises, and perform all reparations necessary, and on all other just and reasonable occasions. He also reserves to himself and his friends, either in his company or not, the right of sporting over the said premises. |
| Taxes and rates. | 4. The tenant to pay and discharge all rates, taxes, and assessments of every description, as well what are chargeable on the landlord as on the tenant, now charged, or hereafter during the time of his occupation to be charged on the premises, except the landlord's property tax, payable in respect of the premises. |
| Penal rents. | 5. The tenant not to plough or convert to tillage any part of the premises now in meadow or pasture, without the consent in writing, of the landlord or his agent; nor sow or plant flax, rape, hemp, or tobacco, upon any part of the said premises, under an additional sum, at the rate of — per acre per annum, to be payable quarterly, on the days aforesaid, and to be considered as rent; and payment thereof to be enforceable accordingly. |
| | 6. The tenant not at any time between the first day of No- |

vember and the first day of April to depasture or feed more than two horses, mares, or geldings, in any one close, at any one time, after giving or receiving notice to quit the same.

Depasturing horses, &c.

7. The landlord to keep in repair the roofs, walls, beams, and stanchions of the dwelling-house and out-houses belonging to the said premises.

Repairs of roofs, &c.

8. The tenant not to sell or part with any dung or compost to be made on the premises, nor any hay, straw, halm, or stubble, or the fodder that shall arise therefrom; but shall spend and consume the same on the premises.

Dung, or compost.

9. The tenant not to let or in any manner otherwise dispose of, or permit to be occupied by any other person, any part of the premises, without the landlord's consent, in writing, under the additional yearly rent of — per acre for each acre so let, disposed of, or permitted to be occupied, and so in proportion for any greater or less quantity than an acre; such additional rent to be payable quarterly on the days aforesaid, and considered as rent, and payment thereof to be enforceable accordingly.

Assigning or under-letting.

Penal rent.

10. The tenant to keep in repair the glass of the windows of the dwelling-house, and all internal repairs and painting; and also find and provide all gates, posts, stiles, rails, pales, and backings, and keep the same in good tenantable repair; and also new-make and repair all the hedges, wall and other fences, and cleanse the ditches, watercourses, and drains, in and upon the said premises.

Repairs of windows, &c.

11. The tenant not to mow any part of the meadow-lands more than once in any one year, or after the tenth day of August in every year; and in all respects to manage and cultivate all the premises in a husband-like manner.

Mowing and cultivation

12. The tenant to pay —, as stated damage, for any waste or damage done, or permitted on the premises, to the amount of five dollars, and so in proportion for any greater or less damage; and also —, as stated damages, for each and every tree or sapling that shall be cut on the premises.

Waste.

Stated damages.

13. The landlord to have and take immediate possession of the premises, in case the tenant shall become a bankrupt, or in case he shall take the benefit of any act for the relief of insolvent debtors, or shall permit any writ of execution to be levied on his effects.

Bankruptcy or insolvency of tenant.

14. This instrument to operate as an agreement for a lease, and not as a lease.

Construction of agreement.

Item.

15. A. B., of — [the landlord], and C. D., of — [the tenant], hereby mutually agree, each of them for himself, his heirs, executors, administrators, and assigns, with the other of them, his heirs, executors, administrators, and assigns, that the said A. B. and C. D. respectively, and his respective heirs, executors, administrators, and assigns, shall and will, from time to time, during the continuance of the term or estate agreed to be granted, as above mentioned, make the payments, and observe, perform, and fulfil all the articles and stipulations above mentioned, to be observed and performed on his and their parts respectively.

In witness whereof, the said parties to these presents have hereunto set their hands the — day of —, one thousand eight hundred and —.

Witness,

A. B.

C. D.

NO. III.

Another Form of an Agreement for a Lease.

Parties agree to execute a lease.

Specification of covenants to be contained in the lease.

Memorandum of an agreement entered into this first day of February, 1844, between A. B., of the city of New York, Esquire, and C. D., of the said city, merchant, whereby the said A. B. agrees that he will, by an indenture, to be executed on or before the first day of May next, demise and let to the said C. D. a certain house and lot in said city, now or late in the occupation of E. F., known as No. —, in — street, to hold to the said C. D. his executors, administrators, and assigns, from the first day of May, aforesaid, for and during the term of twenty-one years, at or under the clear yearly rent of five hundred dollars, payable quarterly, clear of all taxes and deductions except the ground-rent. In which lease there shall be contained covenants on the part of the said C. D., his executors, administrators, and assigns, to pay the rent (except in case the premises are destroyed by fire, the rent is to cease until they are rebuilt by the said A. B.), and to pay all taxes and assessments (except the ground-rent), to repair the premises (except damages by fire), not to carry on any offensive or other business on the premises (except by written permission of the said A. B.), to deliver the same up to the end of the term in good repair (except dangers by fire as aforesaid), with

all other usual and reasonable covenants, and a proviso for the re-entry of the said C. D., his heirs, and assigns, in case of the non-payment of the rent for the space of fifteen days after either of the said rent days, or the non-performance of any of the covenants. And there shall also be contained covenants on the part of the said A. B., his heirs, and assigns, for quiet enjoyment; to renew said lease at the expiration of said term, for a further period of twenty-one years, at the same rent, on the said C. D., his executors, administrators, or assigns, paying the said A. B., his executors, administrators, or assigns, the sum of five hundred dollars, as a premium for such renewal; and that, in case of an accidental fire, at any time during the term, the said A. B. will forthwith proceed to put the premises in as good repair as before such fire, the rent in the mean time to cease. And the said C. D. hereby agrees to accept such lease on the terms aforesaid. And it is mutually agreed that the cost of this agreement, and of making and recording said lease, and a counterpart thereof, shall be borne by the said parties equally.

As witness our hands and seals the day and year first above written.

A. B. (L. s.)

C. D. (L. s.)

NO. IV.

A Landlord's Agreement of Lease.

This is to certify that I have, this first day of March, 1844, let and rented unto Mr. C. D. my house and lot, known as No. —, in — street, in the city of New York, with the appurtenances, and the sole and uninterrupted use and occupation thereof, for one year, to commence the first day of May next, at the yearly rent of four hundred dollars, payable quarterly, on the usual quarter days; rent to cease in case the premises are destroyed by fire.

A. B.

Tenant's Agreement.

This is to certify that I have hired and taken from Mr. A. B. his house and lot, known as No. —, in — street, in the city of New York, with the appurtenances, for the term of one year, to commence the first day of May next, at the yearly rent of four hundred dollars, payable quarterly, on the usual quarter

days. And I do hereby promise to make punctual payment of the rent in manner aforesaid, except in case the premises become untenable from fire, or any other cause, when the rent is to cease; and do further promise to quit and surrender the premises, at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

Given under my hand and seal the first day of March, 1844.

Witness,

C. D. (L. s.)

Security for Rent.

In consideration of the letting of the premises above described, and for the sum of one dollar, I do hereby become surety for the punctual payment of the rent, and performance of the covenants, in the above-written agreement mentioned, to be paid and performed by C. D., as therein specified and excepted; and if any default shall be made therein, I do hereby promise and agree to pay unto Mr. A. B. such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment, or proof of demand being made.

Given under my hand and seal the first day of March, 1844.

E. F. (L. s.)

NO. V.

Tenant's Agreement for a House, Embracing a Mortgage of his Chattels.¹

This is to certify that I, A. B., have hired and taken from C. D. the premises known as No. —, in — street, in the city of New York, for the term of one year from the first day of May next, at the yearly rent of four hundred dollars, payable quarterly. And I hereby promise to make punctual payment

¹ A provision in a lease, whereby the lessee mortgages all his chattels upon the demised premises, as security for the rent, has been held to be good in New York, although an inventory of them is not made and annexed at the time of the execution of the lease; and see *Harding*

v. Coburn, 12 Metc. 333; but would not probably be supported in respect to such property as should be thereafter brought upon the premises, as being contrary to the policy of the Act to abolish distress for rent, see also *Jones v. Richardson*, 10 Metc. 481.

of the rent in manner aforesaid, and quit and surrender the premises at the expiration of said term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted; and engage not to let or underlet the whole or any part of the said premises, or occupy the same for any business deemed extra-hazardous, on account of fire, without the written consent of the landlord, under the penalty of forfeiture and damages. And I do hereby mortgage and pledge all the personal property, of what kind soever, which I shall at any time have on said premises, and whether exempt by law from distress for rent or sale under execution, or not, to the faithful performance of these covenants, hereby authorizing the said C. D., or his assigns, to distrain upon and sell the same, in case of any failure on my part to perform the said covenants, or any or either of them.

Given under my hand and seal the fifteenth day of March,
1844. A. B. (L. s.)

Landlord's Agreement.

This is to certify that I, C. D., have let and rented unto A. B. the premises known as No. —, in — street, in the city of New York, for the term of one year from the first day of May next, at the yearly rent of four hundred dollars, payable quarterly. The premises are not to be used or occupied for any business deemed extra-hazardous on account of fire, nor shall the same, or any part thereof, be let or underlet, except with the consent of the landlord, in writing, under the penalty of forfeiture and damages.

Given under my hand and seal the fifteenth day of March,
1844. C. D.

NO. VI.

Agreement for Lodgings, or Part of a House.

Memorandum of an agreement entered into the — day of —, 1844, by and between A. B., of —, and C. D., of, &c., whereby the said A. B. agrees to let, and the said C. D. agrees to take, the rooms or apartments following: that is to say, an entire first floor, and one room in the attic story, or garret, and

a back kitchen and cellar opposite, with the use of the yard for drying linen or beating carpets or clothes, being part of a house and premises in which the said A. B. now resides, situate and being in number —, in — street, in the city of New York, to have and to hold the said rooms and apartments, and the use of the said yard as aforesaid, for and during the term of half a year, to commence from the — day of — instant, at and for the yearly rent of — dollars, lawful money of the United States, payable monthly, by even and equal portions, the first payment to be made on the — day of — next ensuing the date thereof; and it is further agreed that, at the expiration of the said term of half a year, the said C. D. may hold, occupy, or enjoy the said rooms or apartments, and have the use of the said yard as aforesaid, from month to month, for so long a time as the said C. D. and A. B. may and shall agree at the rent above specified; and that each party be at liberty to quit possession, on giving the other a month's notice in writing. And it is also further agreed that, when the said C. D. shall quit the premises, he shall leave them in as good condition and repair as they shall be on his taking possession thereof, reasonable wear excepted.

As witness our respective hands and seals the day and year aforesaid.

Witness present,

A. B. (L. s.)

C. D. (L. s.)

NO. VII.

An Agreement of Lease.

This agreement, made the first day of February, in the year one thousand eight hundred and sixty-six, between A. B., of the city of Brooklyn, of the first part, and C. D., of said city, of the second part, witnesseth, that the said party of the first part, hath agreed to let, and hereby doth let, to the said party of the second part, and the said party of the second part hath agreed to take, and hereby doth take, from the said party of the first part, the house and lot known as No. —, in — street, in the said city, for the term of three years, to commence on the first day of May, 1866, and to end on the thirtieth day of April, 1869; and the said party of the second part hereby

Term.

covenants and agrees to pay unto the said party of the first part, the annual rent or sum of ——— dollars, payable quarterly in advance, on the usual quarter days, and also to pay the regular annual rent or charge, which is or may be assessed or imposed according to law, upon the said premises for the Croton water, on or before the first day of August in each year during the term, and if not so paid, the same shall be added to and become part of the rent then due ; and to quit and surrender the premises, at the expiration of the said term, in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted ; and that he will not assign this lease, nor let, or underlet the whole or any part of the said premises, nor make any alteration therein without the written consent of the said party of the first part, under the penalty of forfeiture and damages ; and that he will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra-hazardous on account of fire or otherwise, without the like consent, under the like penalty ; and that he will permit the said party of the first part, or his agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, will permit the usual notice of “ to let,” or “ for sale,” to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation. And also, that if the said premises, or any part thereof, shall become vacant during the said term, the said party of the first part, or his representative, may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor ; and re-let the said premises as the agent of the said party of the second part, and receive the rent thereof, applying the same, first to the payment of such expense as he may be put to in re-entering, and then to the payment of the rent due by these presents ; and the balance (if any) to be paid over to the said party of the second part, who shall remain liable for any deficiency. And the said party of the second part hereby further covenants that if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring, and the relation of landlord and tenant, at the option of the said party of the first part, shall wholly cease and determine ; and the said party

Covenant to pay rent.

Water-rate.

To surrender premises.

Not to assign,

nor make alterations.

Extra hazardous occupation.

Permit persons to view premises.

Re-entry for vacancy

and to re-let.

Proviso for re-entry.

of the first part shall and may re-enter the said premises, and remove all persons therefrom; and the said party of the second part hereby expressly waiving the service of any notice in writing of intention to re-enter. And it is further agreed between the parties to these presents, that in case the premises above mentioned shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the said landlord; that in case the damage shall be so extensive as to render the premises untenable, the rent shall cease until such time as the same shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this agreement shall, at the option of the said tenant, cease and come to an end; provided, however, that such damage or destruction shall not have been caused by the carelessness, negligence, or improper conduct of the party of the second part, his agents or servants. And the said party of the first part hereby covenants, that the said party of the second part, on paying the said yearly rents, and performing the covenants aforesaid, shall, and may, peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid. And it is further understood and agreed, that the covenants and agreements contained in the within lease shall be binding upon the parties hereto, their legal representatives and assigns.

for repair in case of fire;

for quiet enjoyment;

to bind the representative of each party.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of

NO. VIII.

A Lease of a House for Five Years.

This indenture, made on the first day of April, one thousand eight hundred and forty-four, between A. B., of the city of New York, merchant, of the first part, and C. D. of said city, bookseller, of the second part, witnesseth, that the said party of the first part hath letten, and by these presents doth grant, demise,

Parties

grant and demise.

and to farm let, unto the said party of the second part, his executors, administrators, and assigns, all that brick house, messuage, or tenement, with all and singular its appurtenances, situate, standing, and being in the ninth ward of the said city of New York, and known as No. —, in — street, in said city, to have and to hold the said premises, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, for the term of five years, from the first day of May, one thousand eight hundred and forty-four, at the yearly rent or sum of six hundred dollars, to be paid in equal quarter yearly payments, as long as the said premises are in good tenable condition. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to *re-enter* the said premises, or to distrain for any rent that may remain due thereon. And the said party of the second part doth hereby covenant to pay to the said party of the first part the said yearly rent, as herein specified, save and except at all times during the said term such proportional part of the said *yearly rent* as shall grow due during such time as the house shall, without the hindrance of the said party of the second part, be and remain untenable, by reason of accidental fire. And that the said C. D., his executors, administrators, and assigns, shall and will during the said term, at his own proper costs and charges, well and sufficiently *keep in repair* the said demised premises, with their appurtenances, when and as often as the same shall require, damages by fire only excepted. And that, at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by fire only excepted. And also that he, the said party of the second part, his executors, administrators, and assigns, shall and will during the said term, pay and discharge *all taxes, assessments, and other charges*, which shall be taxed, assessed, or charged upon the said premises, or any part thereof. And the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and *quietly have*, hold, and enjoy the said demised premises for the term aforesaid, without any interruption or molestation of the said party of the first part, his heirs, or any other person what-

For the term
of five years,

proviso for
re-entry.

Lessor cove-
nants to pay
rent;

to keep the
premises in
repair;

to surrender
at the end of
the term;

and to pay
taxes, &c.

Lessor cove-
nants for
quiet enjoy-
ment;

and to re-
build in case
of fire.

ever, claiming, or to claim by, from, or under him, or them, or any of them. And also, that in case the said premises shall, at any time during the said term, be destroyed or injured by an accidental fire, the said party of the first part, his executors, administrators, or assigns, shall and will forthwith proceed to rebuild or *repair* the said premises in as good condition as the same were before such fire; and that, until such repairs are made and completed, the said rent shall cease.

In witness whereof, the parties to these presents have hereto set their respective hands and seals, the day and year first above mentioned.

Sealed and delivered }
in the presence of }

A. B. (L. s.)
C. D. (L. s.)

NO. IX.

GENERAL FORMS OF COVENANTS.

General
covenants.

1. *By Lessee with Lessor.*

And the said [*lessee*] doth hereby for himself, his heirs,¹ executors, administrators, and assigns,² covenant with the said [*lessor*], his heirs and assigns,³ that, &c.

2. *By two Lessees, jointly and severally with Lessor.*

General
covenants.

And the said [*lessees*] do hereby jointly for themselves, their heirs, executors, administrators, and assigns, and each of them severally doth hereby for himself, his heirs, executors, administrators, and assigns, and as to and concerning only his own acts, deeds, and defaults, covenant with the said [*lessor*], his heirs, and assigns,⁴ that, &c.

3. *By Lessee with Husband and Wife, seised in Right of the Wife.*

And the said [*lessee*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said

¹ The covenantor covenants for his heirs, for the reasons explained *ante*, § 460, *et seq.* of this volume.

² The covenant should extend to the assigns, to guard against any question arising on the second rule in Spencer's case.

³ If the lessor be seised in fee;

but, if possessed of a term only, then *his executors, administrators, and assigns*.

⁴ If the lessor be seised in fee; but if possessed of a term only, then *his executors, administrators, and assigns*.

[*husband*], and —, his wife, and the heirs and assigns of the said [*wife*], that, &c.

4. *By each of Two Lessors, to the extent of a Moiety of Damages.*

And each of them the said [*lessors*], severally and apart from the other of them, doth hereby for himself, his heirs, executors, and administrators, and so as to be answerable or accountable only to the extent of one equal half-part of the damages to be recovered under or by virtue of the covenant hereinafter contained, covenant with the said [*lessee*], his executors, administrators, and assigns,¹ that, &c.

5. *By each of two Lessees, on an Assignment of their Respective Leases, by one Deed, as to the Lands comprised in his Lease.*

And the said A. B. doth hereby for himself, his heirs, executors, administrators, and assigns, and so far only as relates to or concerns the said messuage or tenement and premises, comprised in and demised by the said indenture of lease, bearing date on or about the said — day of —; and the said C. D. doth hereby for himself, his heirs, executors, administrators, and assigns, and so far only as relates to and concerns the said messuage or tenement and premises, comprised in and demised by the said indenture, bearing date on or about the said — day of —, covenant, &c.

NO. X.

SPECIAL FORMS OF COVENANTS THAT MAY BE INSERTED IN A LEASE.

{1. *To Pay Rent.*

And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor, that he, the said lessee, his executors, administrators, and assigns, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

Special
covenants.

¹ *His heirs, executors, administrators, and assigns, if the lease be granted to the lessee and his heirs* (as special occupants) for a life or lives.

2. *To Pay Taxes.*

And also will pay all taxes, rates, duties, and assessments whatsoever, now charged, or hereafter to be charged, upon the said demised premises, or upon the said lessor, on account thereof (excepting the land-tax, and all such other taxes, rates, duties, and assessments, or any portion thereof, which the lessee is or may be by law exempted from).

3. *To Repair.*

And also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things, which at any time during the said term, shall be erected and made, when, where, and so often as need shall be.

Special
covenants.

4. *To Paint Outside every — Year.*

And also, that the said lessee, his executors, administrators, and assigns, will, in every — year in the said term, paint all the outside wood-work and iron-work belonging to the said premises, with two coats of proper oil colors, in a workman-like manner.

5. *To Paint and Paper Inside every — Year.*

And also that the said [*lessee*], his executors, administrators, and assigns, will, in every — year, paint the inside wood, iron, and other works, now or usually painted, with two coats of proper oil colors, in a workman-like manner; and also repaper, with paper of as good a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten, or color such parts of the said premises as are now plastered.

6. *To Insure from Fire, and to Rebuild in Case of Fire.*

And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised, to the full value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, ad-

ministrators, and assigns, and the said lessee, his executors, administrators, or assigns, and keep the same so insured during the said term; and will, upon the request of the said lessor, or his agent, show the receipt for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be burnt down, or damaged by fire, all and every the sums or sum of money, which shall be recovered or received by the said [lessee], his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burned down or damaged by fire as-aforesaid.

Special
covenants.

7. That the [lessor] may Enter to Repair.

And it is hereby agreed, that it shall be lawful for the said lessor, and his agents, at all seasonable times during the said term, to enter the said demised premises to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation which, upon such views, shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators, and assigns, will, within three calendar months next after every such notice, well and sufficiently repair, and make good accordingly.

8. Not to Use the Premises as a Shop.

And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises, or any part thereof, into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling-house, without the consent, in writing, of the said lessor.

9. Not to Assign without Leave.

And also that the said [lessee] shall not, nor will, during the said term, assign, transfer, or set over, or otherwise, by any act or deed procure the said premises, or any of them, to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent, in writing, of the said [lessor], his executors, administrators, or assigns, first had and obtained.

10. *To Leave the Premises in Good Repair.*

Special
covenants.

And further, that the said [*lessee*] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures, now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted.

11. *To Insure Future Buildings when Covered in.*

Covenants
by lessee.

And also that he the said [*lessee*], his executors, administrators, or assigns, shall and will, at his and their own expense, from time to time insure, or cause to be insured, and during the said term kept insured, every additional building which may hereafter, with such approbation as is hereinafter mentioned, be built on the said ground hereby demised, or any part thereof, and effect the same within six days after each such building shall be built or covered in; and will increase the amount of such insurances respectively, when and as each such building shall be completed, so as to make the sum insured thereon equal to three-fourth parts, at least, of the then value thereof.

12. *To Lay out a given Sum in Repairs.*

That he, the said (*lessee*), his executors, administrators, or assigns, will, within the first three years of the said term hereby granted, lay out and expend the sum of —, at least, in and upon the substantial repairs of the said demised premises, and every part thereof; the application of the said sum, and the said reparation of the said premises as aforesaid, to be from time to time surveyed, inspected, and approved by such proper person or persons as the said [*lessor*], his heirs, or assigns, shall appoint and direct to survey and inspect the same. And also that he, the said [*lessee*], his executors, administrators, and assigns, will, when required, produce and deliver to the said [*lessor*], his heirs, or assigns, the bills and receipts of the different tradesmen employed in doing such repairs as aforesaid, for the respective sums to be paid them for that purpose, or duplicates thereof.

13. *To Pay Share of Expenses of Repairing Ways.*

And also will, from time to time, pay and allow a reasonable proportion towards the expenses of making, supporting, and repairing all ways, roads, pavements, party-walls, or party-fence walls, or fences, gutters, drains, sewers, pipes, and watercourses, belonging, or which at any time shall belong, to the premises hereby demised, or which shall be used for the convenience of the same, or any part thereof, in common with said premises near or adjoining thereto, or which shall be reasonably required by the public authorities, to be made and formed for the purpose of being so used, and towards the expenses of cleansing such gutters, drains, sewers, pipes, and watercourses, such proportion to be ascertained by the architect or surveyor for the time being of the said public authorities; and that, in default of payment of such proportion, the same shall be recoverable as or in the nature of rent in arrear.

*Covenants
by lessee.*

14. *Another Form.*

And also that he, the said [*lessee*], his executors, administrators, and assigns, shall and will, from time to time during the said term, pay a reasonable share of the charges of making, repairing, and cleansing all party-walls, fences, sewers, drains, gutters, and other easements belonging, or which shall belong, to the said premises hereby demised, in common with the owners or occupiers of any adjoining premises.

15. *To Procure Supply of Water for Demised Premises.*

And also that he, the said [*lessee*], his executors, administrators, and assigns, shall and will, during the said term hereby granted, procure the supply of water for the said messuage and premises hereby demised, from the Croton Water Company; provided that such company so to be named shall yield water for that supply of as good quality, in a sufficient quantity, and on as reasonable terms, as the same company shall supply other premises in the same vicinity or neighborhood, or as the premises hereby demised could be supplied by any other company or persons.

16. *By Lessee of a Public House, to Purchase his Porter of Lessor.*

Covenants
by lessee.

That he, the said [*lessee*], his executors, administrators, and assigns, will, at all times during the said term, as often as his or their occasion shall require, purchase of and from the said [*lessor*], his executors, or administrators, either alone, or jointly with his or their partner or partners for the time being, or such other person or persons carrying on the business of brewers as he, the said [*lessor*], his executors or administrators, shall appoint, all the beer, called porter, that shall be sold and disposed of in the said — house, called the —, or drawn in the same for sale; and shall not deal or contract with any other person or persons for any porter, to be sold or drawn in the said house; provided that the said [*lessor*], his executors, or administrators, shall at such times deal in and vend such porter as aforesaid, and be willing to supply the same to the said [*lessee*], his executors, administrators, and assigns, at the fair current market price thereof. And also that if, at any time hereafter during the said term, the said [*lessee*], his executors, administrators, or assigns, shall grant any underlease of, or assign over his interest in, the said premises, there shall be contained in such underlease, or in the deed whereby his interest shall be assigned, a covenant on the part of the underlessee or assignee, his or her executors, administrators, or assigns, to be entered into with the said [*lessor*], his executors and administrators, who shall be made parties for the purpose, to the same or the like effect, and subject to the same or the like proviso, *mutatis mutandis*, as is lastly hereinbefore contained.

17. *That Lessor and his Tenants shall have Watercourse through Demised Premises.*

And also that the said [*lessor*], and his assigns, and his and their tenants, shall have free liberty of watercourse in and through the premises hereby demised, from any adjoining premises, or other estates belonging to the said lessor, by means of the sewers, drains, or channels there, to carry off the water from the other houses, near or adjoining thereto, the person or persons forming or using any such watercourses making good all damage occasioned thereby, and contributing to the expense of keeping in repair and cleansing the same.

18. *Not to Obstruct Lights, by Building.*

And shall not, by building or otherwise, stop or obstruct any light or lights belonging to any messuage or tenement, the estate or interest whereof, in possession or in reversion, is in the said [lessor]. Covenants by lessee.

19. *In a Building Lease, not to Permit Thoroughfare over Premises.*

And also that the said [lessee], his executors, administrators, or assigns, will not, at any time or times during the said term, permit any way or thoroughfare over or through any part of the said premises hereby demised.

20. *Not to Assign Premises, or Underlet them for a Longer Term than a Year, without giving Lessor a Right of Pre-emption.*

And also that the said [lessee], his executors, or administrators, shall not nor will, at any time during the said term, assign and transfer the said premises, or any part thereof, or underlet the same, or any part thereof, for a longer term than one year, to any person or persons whomsoever, except a person or persons who shall have entered into partnership with him, the said [lessee], his executors, or administrators, in the business which shall then be carried on by him or them, at the said factory and premises, or to whom the said [lessee], his executors, or administrators, shall have assigned the whole or some part of his said business, without first offering to sell and assign the same premises, with the buildings and erections thereon, to the said [lessor], or other the person or persons who shall then be entitled to the reversion of the said premises, immediately expectant on the determination of the said term, at a fair valuation, to be made by two indifferent persons, one to be chosen by the said [lessee], his executors, or administrators, and the other by the said [lessor], or other the person or persons entitled as aforesaid; and, in case of the disagreement of such two persons, then by an umpire, to be chosen for that purpose by such two persons, before they proceed to make such valuation; and, in case the said [lessor], or other the person or persons then entitled as aforesaid, shall refuse or decline to take to and purchase the said premises at such

Covenants
by lessee.

valuation, or shall omit or neglect to give notice of his or their determination so to do, for the space of three calendar months next after such offer shall be made in writing to him or them as aforesaid, it shall be lawful for the said [lessee], his executors, or administrators, to assign, or transfer, or underlet the said premises, or any part of the same, to any person or persons whomsoever, as he or they shall think fit.

21. *To leave Assignment or Underlease, at Office of Lessor's Solicitor, for Registry.*

That in case the said premises, or any part thereof, shall be assigned or underlet for all or any part of the term hereby granted, every or any assignment or underlease to be so made shall, within three calendar months after the execution of the same, be left, for not less than seven days, at the office of the solicitor for the time being of the said [lessor], his heirs, appointees, or assigns, to the intent that the same may be there registered, and such registry to be at the expense of the said [lessee], his executors, administrators, or assigns.

22. *To Keep the Orchards fully Planted, and Preserve the Same from Injury by Cattle.¹*

And also that the said [lessee], his executors, administrators, and assigns, will, at all times during the said term, keep the orchards full treed, and planted with good thriving young apple-trees, of such sorts and sizes as the said [lessor], his heirs, or assigns, shall direct; the said [lessee], his executors, administrators, or assigns, taking the old decayed trees in lieu thereof; and will fence out and preserve the same from being injured by cattle or otherwise, and not suffer any cattle, that may injure the trees in such orchards, to depasture therein.

23. *To Keep Lawn and Garden in Order.*

And also shall and will, at his and their own costs, keep up and preserve in good condition the lawn and garden belonging to the said messuage, in the same order and form as the same respectively are now in, and the fences and walls around and

¹ In addition to the forms contained in this division of the Appendix, a great variety of agricultural covenants will be found in the precedents of farming leases inserted in a subsequent part.

about the same; and do, or cause to be done, in proper and reasonable times of the year, and in a proper manner, all necessary work in and to the same, and, in particular, for the preserving, cherishing, encouraging, and keeping in health and bearing the wall and other fruit trees, and the herbs, shrubs, plants, flowers, and roots now growing, or henceforth during the said term to grow therein, and for the due, orderly, and seasonable manuring, cultivating, and cropping the same, during the said term.

*Covenants
by lessee.*

24. Not to convert Old Meadow into Tillage.

And shall not nor will break up or convert into tillage any of the old meadow or pasture ground belonging to the said demised premises; and shall not mow the same, without manuring every acre thereof with eight hogsheads of good well-burnt stone lime, or one hundred and twenty wagon-loads of good rotten dung, and so in proportion for a less or greater quantity an acre, except such part of the meadow lands as shall have been well flooded with water in the winter preceding every mowth.

25. Not to make Hedges, except under Certain Conditions.

And shall not nor will, at any time during the said term, permit or suffer the growth of the hedges to be cut, without new-making the same; nor make any of the hedges on the said premises, unless the adjoining ground, if tillage-ground, shall be in tillage for the first crop, and then shall and will new-make, cast, dyke, and thatch such hedges in a husband-like manner. And shall not nor will permit any wood to be cut under seven years' growth, nor any in the last two years of the said term. And shall and will give notice, in writing, unto the said [*lessors*], or one of them, their, or one of their heirs, or assigns, at least one clear month previously to the time of making any hedge, that the trees, plants, and saplings, which are intended to remain therein, may be marked.

26. That Lessor may, in last Year of Term, enter on Part of Demised Premises to prepare next Wheat Crop.

And also that the said [*lessor*], his heirs, or assigns, and his or their succeeding tenant, shall be at liberty, at any time after

Covenants
by lessor.

the — day of —, in the last year of the said term, to enter upon such part of the said demised lands, not exceeding twenty acres, as shall be in course for wheat in the succeeding year, the same to prepare for his or their wheat crop, and do the needful husbandry thereon, allowing unto the said [*lessee*], his executors, administrators, or assigns, a reasonable compensation therefor.

27. *The Lessor Covenants for Quiet Enjoyment.*

And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

28. *To find Lessee rough Timber for Repairs.*

And also that he, the said [*lessor*], his heirs, and assigns, will, from time to time, and at all times during the said term, find, provide, and allow unto the said [*lessee*], his executors, administrators, and assigns, on the said demised premises, or within four miles thereof, a sufficient quantity of rough timber, for keeping the said premises, with the gates, posts, pales, rails and fences thereon, in proper condition and repair, upon request in writing, specifying the quantity wanted for that purpose, being made by the said [*lessee*], his executors, administrators, or assigns.

29. *To Rebuild or Repair in Case of Fire.*

That in case the said premises hereby demised, or any part thereof, shall, at any time or times during the continuance of this demise, happen to be damaged or destroyed by fire, he, the said [*lessor*], his heirs or assigns, will, with all convenient speed, repair or rebuild the same premises which shall or may happen to be damaged or destroyed by fire as aforesaid, and make the same again fit for the habitation of the said [*lessee*], his executors, administrators, or assigns.

30. *To lay out a Given Sum in Repairs, in case of Accidental Fire.*

That if the said buildings hereby demised, or any part thereof, shall, at any time or times from the day of the date hereof, until the commencement, and thence during the continuance of the term hereby granted, be burned down or damaged by fire (other than through the wilful neglect or default of the said [lessee], his executors, administrators, or assigns), and in case every or any such assignment or under-lease, shall have been so left for registry as aforesaid, and no hazardous trade or business shall be carried on upon the said premises, without consent as aforesaid, but not otherwise, the said [lessor], shall forthwith lay out and expend (whether any insurance from fire shall have been effected upon the said premises or not) the sum of —, or so much thereof as may be sufficient for making good such loss or damage, or so far as the same will extend for that purpose, upon the same plan as before such fire happened, or such other plan as by the surveyor for the time being of the said [lessor], his heirs, appointees, or assigns, shall be approved.

Covenants
by lessee.

31. *To Renew the Lease.*

And that the said [lessor], his executors, administrators, or assigns, will, on or before the expiration of this present lease, at the request and expense of the said [lessee], his executors, administrators, or assigns, grant and execute to him and them a new lease of the premises hereby demised, with their appurtenances, for the further term of twenty-one years, to commence from the expiration of the term hereby granted, at the same yearly rent, payable in the like manner, and subject to the like covenants, provisos, and agreements (except a covenant for further renewal), as are contained in these presents.

32. *For Title, in an Assignment of Leaseholds.*

And the said [assignor] doth, &c., that, notwithstanding any act, deed, or thing whatsoever made, done, or suffered to the contrary, by him, the said [assignor], the said [hereinbefore in part recited], indenture of lease is still in full force for the said residue of the said term thereby granted, and neither void nor voidable. And also that, notwithstanding any such act, deed,

Covenants
by assignor
of lease.

Covenants
by assignor
of lease.

or thing, as aforesaid, he, the said [*assignor*], now hath in himself good right, by these presents, to assign the said messuage or tenement and premises, with their rights, members, and appurtenances, unto the said [*assignee*], for the residue of the said term of — years, in manner aforesaid. And also that, subject to the payment of the rent, and the observance and performance of the covenants, provisos, and conditions in the said lease contained, and by or on the part of the [*lessee*], his executors, administrators, or assigns, to be observed and performed, it shall be lawful for the said [*assignee*], his executors, administrators, or assigns, henceforth, during the residue of the said term, to enter into and upon, hold, and enjoy the said messuage or tenement and premises, with their rights, members, and appurtenances, and to receive and take the rents and profits thereof, without any hindrance or interruption whatsoever by him, the said [*assignor*], his executors, or administrators, or any other person or persons whomsoever, lawfully, or equitably, and rightfully claiming, or to claim any estate, right, title, or interest, at law or in equity, of, in, to, or out of the same messuage or tenement and premises, or any part thereof, by, from, through, under, or in trust for him, the said [*assignor*], his executors, or administrators. And that free and clear, and freely and clearly and absolutely discharged, or otherwise, by him, the said [*assignor*], his heirs, executors, or administrators, at his or their own costs in all things, protected and kept indemnified from and against all former and other assignments, surrenders, forfeitures, and cause or causes of forfeiture, arrears of rent, estates, titles, charges, and encumbrances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter, made, committed, occasioned, or suffered by the said [*assignor*], his executors, or administrators, or any person or persons rightfully claiming, or to claim, any estate, right, title, or interest, at law or in equity, of, in, to, or out of the same messuage or tenement and premises, or any part thereof, by, from, through, under, or in trust for him, the said [*assignor*], his executors, or administrators, or by his or their acts, means, consent, default, privity, or procurement. And moreover, that he, the said [*assignor*], his executors and administrators, and all persons whosoever lawfully or equitably and rightfully claiming, or to claim, any estate, right, title, or interest, at law or in equity, of, in, to, out of, or upon the said messuage or tene-

ment and premises, or any part thereof, by, from, under, or in trust for him, the said [assignor], his executors, or administrators, will henceforth, during the residue of the said term, upon every reasonable request, and at the cost of the said [assignee], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such lawful and reasonable acts, deeds, and assurances in the law whatsoever, for the further, better, or more satisfactorily assigning or assuring the said messuage or tenement and premises, or any part thereof, with the rights, members, and appurtenances, unto the said [assignee], his executors, administrators, or assigns, for the then residue of the said term of — years, as by the said [assignee], his executors, administrators, or assigns, or his and their counsel in the law, shall be reasonably required, and be tendered to be made, done, and executed.

Covenants
by assignor
of lease.

33. *By Assignee of a Lease for Future Payment of Rent and Performance of Covenants, and for the Assignor's Indemnity.*

And the said [assignee] doth hereby, for himself, &c., that he, the said [assignee], his executors, administrators, or assigns, will from time to time, during the residue of the said term, pay the said yearly sum of —, when and as the same shall henceforth become due, and observe and perform the covenants, provisos, and conditions, in the same indenture contained, and which, by or on the part of the said [lessee], his executors, administrators, and assigns, are henceforth to be observed and performed. And also will, at all times hereafter, at his or their own costs, defend, save harmless, and keep indemnified the said [assignor], his heirs, executors, and administrators, and his and their lands, tenements, goods, chattels, and effects, against all payments, costs, losses, damages, and expenses whatsoever, which he or they shall or may make, pay, sustain, or be liable to, on account of the said yearly rent, which shall henceforth become due and payable, or any part thereof, and on account of the breach, non-performance, or non-observance by or on the part of the said [assignee], his executors, administrators, or assigns, of all and every or any of the covenants, provisos, and conditions contained in the said indenture of lease, to be observed and performed by the said [lessee], his executors, administrators, and assigns, and also against all actions and suits

Covenants
by assignee
of lease.

Covenants
by assignee
of lease.

at law or in equity, which shall be commenced or prosecuted against the said [*assignor*], his heirs, executors, or administrators, for or on account of the said rent, covenants, and provisos, and conditions, or any of them, and henceforth to be paid, observed, and performed.

NO. XI.

PROVISOS AND DECLARATIONS.

1. *For Lessor's Re-entry, on Lessee's Non-payment of Rent or Non-performance of Covenants.*¹

Provisos and
declarations.

Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained, on the part of the said lessee, his executors, administrators, and assigns, then, and in either of such cases, it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as of his or their former estate, any thing hereinafter contained to the contrary notwithstanding.

2. *For Lessor's Re-entry on Non-Payment of Rent after Demand or Notice.*

Provided always, that if the rent hereby reserved, or any part thereof, shall at any time be in arrear for the space of one year, and not paid within six calendar months after the same shall have become due, and be demanded by a notice in writing, to be delivered to the said [*lessee*], his executors, administrators, or assigns, or to be affixed on some conspicuous part of the premises hereby demised, or left with the occupier, or some

¹ The advantage of a proviso for re-entry consists in its enabling the lessor to wrest his property from the hands of a troublesome or insolvent tenant, upon whom an action

or distress for rent would be thrown away; it affords the lessor an indemnity against future loss, though he cannot by its agency recover past claims.

or one of the occupiers of the same premises, or any part thereof, it shall be lawful for the said [*lessor*], &c. Provisos and declarations.

3. *That Lessor shall not Re-enter for a Forfeiture without Notice.*

Provided always, that no breach of any of the covenants hereinbefore contained (except the covenant for payment of rent, and the covenant for insurance against fire), shall occasion any forfeiture of these presents, or the estate hereby granted, or give any right of re-entry pursuant to the clause in that behalf hereinbefore contained, unless or until the said [*lessor*], his heirs, or assigns, shall have given unto the said [*lessee*], his executors, administrators, or assigns, or unto the tenant in the actual possession of the premises, or, in case there shall be no tenant in the actual possession of the premises, shall have affixed upon some notorious part of the premises, a notice in writing, bearing date on the day of giving or affixing such notice, and specifically mentioning the breach or breaches of covenant complained of, and expressly notifying that if the same be not remedied within the space of three calendar months from the date of such notice, the said [*lessor*], his heirs, or assigns, intends to enter upon the premises as forfeited, pursuant to a clause for that purpose in the lease thereof contained, and unless such breach or breaches shall not be remedied within the space of three calendar months from the date of such notice.

4. *For Lessor's Re-entry into that Part only of Premises in Respect of which Lessee shall make Default.*

Provided always, and it is hereby expressly agreed, that if any one or more of the rents hereby reserved, or any part thereof respectively, shall be unpaid by the space of — days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach, or non-performance, or non-observance of all or any one or more of the covenants or agreements herein contained, on the part of the said [*lessee*], his executors, administrators, or assigns, then, and in any or either of the said cases, it shall be lawful for the said [*lessor*], his heirs, or assigns, to re-enter into or upon that part, or those respective parts only of the said premises hereby demised, in respect of which there shall have been such non-payment, non-perform-

Proviso and
declarations. ance, non-observance, or default ; it being the true intent and meaning of these presents, that the right of re-entry of the said [lessor], his heirs, or assigns, under this present provision, shall not extend or be applicable to any part or parts of the said premises hereby demised, in respect whereof the rent, covenants, and agreements, shall have been duly paid, performed, and observed.

5. *For Suspension or Apportionment of Rent, on Premises becoming Uninhabitable from Fire.*

Provided always, and notwithstanding any thing hereinbefore contained, that if the said messuage or tenement and premises hereby demised shall be materially injured by fire, so as to be rendered unfit for habitation, and for carrying on the business of a coffee-house and tavern, and the said [lessee], his executors, administrators, or assigns, or his or their under-tenants, shall actually quit the occupation of the same messuage, &c. ; then, during such time as the same messuage, &c., shall remain unfit for habitation, and the occupation of the same shall be quitted as aforesaid, the rent hereby reserved shall be suspended or apportioned, so and in such manner that the said [lessee], his executors, administrators, or assigns, shall be entitled to retain, or be discharged from, so much and such part of the same rent, as shall be in proportion to the time or number of days during which the said messuage, &c., shall remain unfit for habitation, and the said [lessee], his executors, administrators, and assigns, or his or their under-tenants, shall actually cease to inhabit the same.

6. *Another Form.*

And further, that in case the said messuage or tenement and premises, or such of them as shall at any time or times during the said term be destroyed or damaged by fire, shall not be rebuilt or repaired by the said [lessor], his heirs, or assigns, within the space of six calendar months next after such fire happening, then the said rent hereby reserved shall cease and be suspended, until the said premises, so destroyed or damaged by fire, shall be rebuilt, or repaired fit for the occupation of the said [lessee], his executors, administrators, or assigns ; and at that time the said rent shall revive and recommence, and become again payable in manner aforesaid.

7. For Cesser of Term, in case of Fire, the Tenant having the Option of giving up Possession, or of Repairing, and continuing Tenant.

Provided always, nevertheless (and it is hereby further declared and agreed), that if the said messuage or tenement and premises hereby demised, or intended so to be, or any part thereof, or any other building erected, or to be erected, on the said piece or parcel of ground hereby demised, or intended so to be, or any part thereof, shall, at any time or times during the said term of — years, be destroyed or damaged by fire, the said [lessee], his executors, administrators, and assigns, shall have the option, at any time within fourteen days after such fire, of giving notice that the said term hereby granted shall cease or determine on the next rent day after such fire ; and in that case, and from that time, provided an insurance shall have been made and kept on foot, pursuant to the covenant of the said [lessee], hereinbefore contained, and provided all arrears, of rent shall be paid up to that day, the said term shall cease and determine ; and the said [lessee], his executors, administrators, and assigns, shall be discharged of and from any further payment of the rent hereby reserved, or performance of the covenants, provisos, and conditions hereinbefore contained ; and in that case, also, the money which shall become payable, by virtue of any such insurance, and the remaining materials of the buildings, shall become and be the absolute property of the said [lessor], his heirs, or assigns ; or the said [lessee], his executors, administrators, or assigns, shall have the liberty of continuing the tenant or tenants for the residue of the said term ; and, in that case, he or they shall continue such tenant or tenants, and shall re-instate the buildings so destroyed or damaged by fire, to the satisfaction of the surveyor for the time being of the said [lessor], his heirs, or assigns, within — after such fire ; then the remaining materials of the buildings shall become and be the property of the said [lessee], his executors, administrators, or assigns ; and as soon as the loss or damage by fire shall be repaired, the sum to be received for such insurance shall be paid to him or them.

Provisos and
declarations.

8. *For Apportionment of Rent, on Surrender, by Lessee, of Part of Demised Premises.*

Provisos and
declarations.

And it is hereby further declared and agreed that so much and such part of the said premises as were granted to the said [lessee], by the said (hereinbefore in part recited) indenture of lease, and are not hereby surrendered to the said [lessor], as aforesaid, shall henceforth be held and enjoyed by the said [lessee], his executors, administrators, and assigns, at the reduced yearly rent of —, by way of apportionment of the said rent of —, and under and subject to the same covenants, provisos, and conditions, as are contained in the same indenture of lease.

9. *Between Vendor [Lessor] and Purchaser, for Apportionment of Rent, on a Sale of the Reversion of Part of the Demised Premises.*

And the said [vendor-lessor] and [purchaser], as far as they lawfully may or can, do hereby mutually consent and agree, and also direct and appoint that the said yearly sum of —, payable by the said [lessee], as aforesaid, shall (subject to a proportional part of the deductions to be made out of the said rent), henceforth during the residue of the term of the said [lessee] in the said lands and hereditaments hereby released and conveyed, or intended so to be, be payable and paid to the said [purchaser], his heirs, and assigns, as his and their proportion of the said rent, for or in respect of so many and such parts of the lands and hereditaments out of which the same rent is reserved as are hereby released and conveyed, or intended so to be.

10. *For Determination of Lease, at the End of first Fourteen Years, at Option of Lessee.*

Provided always, that if the said [lessee], his executors, administrators, or assigns, shall be desirous of quitting the said premises, and surrendering and delivering up this present indenture of lease, and of such his, her, or their desire shall give notice in writing, to be delivered to the said [lessor], his heirs, or assigns, or to be left at his, her, or their respective usual or last known place of abode, at least twelve calendar months before the end or expiration of the first fourteen years of the said

term hereby granted, and if the said yearly rent hereby reserved shall be paid up to the time of such quitting, and the said premises left in such good and sufficient repair as hereinbefore mentioned, and all and every the said taxes and assessments paid and discharged ; then, from and immediately after the end and expiration of the first fourteen years of the said term hereby granted, these presents, and every thing herein contained, shall thenceforth cease and determine.

Provides and
declarations.

11. For Determination of Lease by Either at the End of first Three or Five Years of the Term, on giving Notice to the Other.

Provided always, that if the said [*lessor*], his executors, administrators, or assigns, shall be desirous of putting an end to the said term of seven years hereby granted at the end of the first three or five years thereof, and shall give unto the said [*lessee*], his executors, administrators, or assigns, six calendar months' notice in writing, of such his or their desire, previously to the expiration of the first three or five years ; or if the said [*lessee*], his executors, administrators, or assigns, shall be desirous to quit the said premises hereby demised at the end of the first three or five years of the said term of seven years, and of such his or their desire shall give six calendar months' notice, in writing, to the said [*lessor*], his executors, administrators, or assigns, before the expiration of the said first three or five years, then, and in either of the said cases, these presents, and every clause and thing herein contained, shall, at the expiration of the first three or five years of the said term, cease and determine, without prejudice, nevertheless, to any remedy which either of the said persons, parties hereto, or his respective representatives may have against the other of them, or his representatives, for breach, non-observance, or non-performance of the said covenants or agreements hereinbefore contained, or any or either of them.

12. In Lease for Lives, or for Years determinable with Lives, that Proof of Lives being in Existence shall lie on Lessee.

Provided always, that when and as often as any question shall arise in any court of justice, whether the persons or person on whose death the term hereby granted is made determinable be living or dead, it shall be incumbent on the person or per-

Proviso and
declarations.

sons then interested in, or claiming to have the right of, the said premises, by or under this present demise, to prove such person or persons to be living ; and that, in default of such proof, such person or persons shall be deemed and taken to be dead, any law or usage to the contrary notwithstanding.

13. *To enable Under-Lessee to pay his Rent to Original Lessor.*

And it is hereby further declared and agreed that the said [*under-lessor*], his executors or administrators, shall pay the original rent reserved to the said [*original lessor*], his heirs, or assigns, within ten days next after the same shall have become due quarterly ; but in case he shall neglect or refuse so to do, then it shall be lawful for the said [*under-lessee*], his executors, administrators, or assigns, to pay the same unto the said [*original lessor*], his heirs, or assigns, by and out of the rent hereby reserved, if he or they shall accept thereof ; and that his or their receipts shall be good and effectual discharges for so much of the rents for which such receipts shall be given.

14. *That, on Lessee's Default, Lessor may insure, and recover Premiums, as Rent in Arrear.*

And that if the said [*lessee*], his executors, administrators, or assigns, shall, at any time during the said term, neglect or refuse to effect or renew, and continue such insurance or insurances, or to produce such policy or policies, or any such receipt as aforesaid, then it shall be lawful for the said [*lessor*], his heirs, executors, administrators, or assigns, to insure the said premises in such manner as he or they shall think proper ; and the amount of the sum or sums which shall from time to time be expended in so doing shall be added to the said yearly rent hereby reserved, and shall or may be recovered in the same manner as rent in arrear ; and that, from time to time, in case of fire, all such sum and sums of money as shall be recovered or received, by virtue of such insurance or insurances, shall, with all convenient speed, be applied, expended, and paid out, under the direction of the said [*lessor*], his heirs, or assigns, or of his or their surveyor, in rebuilding or restoring and repairing the said erections, buildings, and premises ; and in case of deficiency, the same shall be made good by the said [*lessee*], his executors, administrators, or assigns.

NO. XII.

CONCLUSIONS OF LEASES.

1. *In a Lease between Private Individuals, when executed by Both.*

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Conclusions
of leases.

2. *In a Lease by a Corporation.*

In witness whereof, the said [*lessors*] have, to one part of these presents, caused their common seal to be affixed, and to another part of these presents the said [*lessee*] hath set his hand and seal the day and year first above written.

NO. XIII.

A Lease of City Property with Covenants.

This indenture, made the first day of April, one thousand eight hundred and forty-four, between A. B., of the city of New York, Esquire, party of the first part, and C. D., of said city, merchant, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained, on the part and behalf of the said party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed; has granted, demised, and to farm letten, and by these presents does grant, demise, and to farm let unto the said party of the second part, his executors, administrators, and assigns, all that certain messuage or dwelling-house and lot of ground, situate, lying, and being in the fifteenth ward of the said city of New York, and known as number —, in Tenth Street, bounded as follows, to wit: beginning at a point on the south-erly side of Tenth Street distant westerly from the south-westerly corner of Broadway and Tenth Street three hundred feet, and running thence westerly in front twenty-five feet, thence south-erly, at right angles to Tenth Street, ninety-eight feet, thence easterly parallel to Tenth Street, twenty-five feet, thence north-

Parties, &c.,

grant and
demise

the prem-
ises.

reservation
of rent;

proviso for
re-entry,

and for dis-
tress.

Lessee
covenants
to pay rent;

erly, at right angles to Tenth Street, ninety-eight feet, to Tenth Street, at the point or place of beginning. To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and assigns, from the first day of May, one thousand eight hundred and forty, for and during, and until the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended; yielding and paying therefor unto the said party of the first part, his heirs, or assigns, yearly, and every year during the said term hereby granted, the yearly rent or sum of five hundred dollars, lawful money of the United States of America, in equal quarter-yearly payments, to wit, on the first day of May, August, November, and February, in each and every of the said years, provided always, nevertheless, that if the yearly rent above reserved, or any part thereof, shall be behind or unpaid for the space of fifteen days next after any of the days of payment, whereon the same ought to be paid as aforesaid, it being first lawfully demanded; or if default shall be made in any of the covenants herein contained, on the part and behalf of the said party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed; then and from thenceforth it shall and may be lawful for the said party of the first part, his heirs, or assigns, into and upon the said demised premises, and every part thereof, wholly to *re-enter*, and the same to have again, repossess, and enjoy, as in his and their first and former estate; and that from and after such re-entry made, this lease, and every thing therein contained, shall determine and be utterly void to all intents and purposes; and also, in the event of the said rent remaining due and unpaid in manner aforesaid, it shall and may be lawful for the said party of the first part, his executors, administrators, and assigns, to distrain for any rent that may remain due thereon, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding.

And the said party of the second part, for himself, his heirs, executors, and administrators, doth *covenant* and agree to and with the said party of the first part, his heirs, and assigns, by these presents, that the said party of the second part, his executors, administrators, or assigns, shall and will yearly and every year during the said term hereby granted, well and truly pay, or cause to be paid, unto the said party of the first part, his heirs, or assigns, the said *yearly rent* above reserved, on the days and

in the manner limited and prescribed as aforesaid for the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents (save and except at all times during the said term, such proportionable part of the said yearly rent as shall or may grow due during such time as the said tenement shall, without the hindrance of the said C. D., his executors, administrators, or assigns, be and remain uninhabitable by reason of accidental fire).

except in
case of fire ;

And also that he, the said C. D., shall and will pay, or cause to be paid, *all taxes*, assessments, and impositions whatsoever (ground-rent only excepted), which at any time during the continuance of the said term, shall or may be assessed or imposed on the said premises, or any part thereof, or on the said A. B., his executors, administrators, or assigns, on account thereof.

to pay taxes
and other
charges ;

And also that he, the said C. D., his executors, administrators, or assigns, shall and will, at his or their own proper costs and charges, cause to be well and sufficiently painted all the outside wood and iron work belonging to the said premises every third year during the continuance of the said term, and shall and will also, at his and their like proper costs and charges, during the said term, keep in good, sufficient, and tenantable repair, as well all and singular the glass and other windows, rooms, floors, partitions, ceilings, walls, roofs, gutters, fences, pavements, grates, sinks, privies, drains, wells, and watercourses, as also all and every other the parts and appurtenances of the said premises (damage happening by casual fire only excepted).

to keep the
premises in
repair ;

damages
by fire
excepted ;

And also that he, the said C. D., his executors, administrators, or assigns, shall not, nor will at any time during the continuance of the said term, use or carry on, or suffer and permit to be used and carried on, in or upon the said premises, or assign over this lease, or any part of the premises herein contained, to any person or persons using or carrying on the trade, business, or calling of a maker of sedan or other chairs, baker, brewer, butcher, currier, distiller, dyer, founder, smith, soap-boiler, school-master, or school-mistress, sugar-baker, auctioneer, pewterer, tallow-chandler, or tallow-melter, working brazier, tinman, tripe-boiler, pipe-maker, pipe-borer, plumber, or any other noxious or offensive trade, business, or calling whatsoever, without the consent, in writing, of the said A. B., his executors, administrators, or assigns, first had and obtained for that purpose

not to carry
on offensive
trades ;

And also that he, the said C. D., his executors, administra-

assign or
underlet
without the
consent of
lessor ;

tors, or any of them, shall not, nor will at any time during the said term, demise, let, set, or assign over the said premises, or any part thereof, to any person or persons whomsoever, for any term or time whatsoever, without the license and consent of the said A. B., his heirs, or assigns, in writing, under his or their hand, first had and obtained for such purpose.

and surren-
der at the
end of the
term.

And also that, on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part, his executors, administrators, or assigns, shall and will peaceably and quietly leave, surrender, and yield up unto the said party of the first part, his heirs, or assigns, all and singular, the said demised premises, with their appurtenances, in such good, sufficient, and tenantable repair as aforesaid ; together with all and every the doors, locks, keys, bolts, bars, chimney-pieces, grates, windows, shelves, and other things thereunto belonging, in as good plight and condition as the same now are (reasonable use and wear thereof, and casualties happening by fire only excepted).

Lessor cov-
enants for
quiet enjoy-
ment ;

And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, by these presents, that the said party of the second part, his executors, administrators, or assigns, paying the said yearly rent above reserved, and performing the covenants and agreements aforesaid, on his or their part ; the said party of the second part, his executors, administrators, and assigns, shall and may, at all times during the said term hereby granted, peaceably and quietly have, hold, and enjoy the said demised premises, for and during the said term of years hereby granted, without any manner of let, suit, trouble, or hindrance of or from the said party of the first part, his heirs, executors, administrators, or assigns, or any other person or persons whomsoever, lawfully claiming from, by, or under him, or any of them ; and that freed and discharged, or otherwise indemnified of and from all former and other grants, sales, feoffments, demises, dower, debts, duties, judgments, ground-rents, due or to grow due thereon during the said term, and all other estates, rights, titles, charges, and encumbrances whatsoever, had, made, done, or suffered in any wise whatsoever, by the said party of the first part, or by any other person or persons whatsoever, having or lawfully claiming any estate, right, title, or interest in the said premises, or any part or parcel thereof.

And that the said A. B., his executors, administrators, or assigns shall and will, on or before the expiration of this present lease, on the request, and at the costs and charges of the said C. D., his executors, administrators, and assigns, grant and execute to him and them a new and fresh lease of the premises hereby demised, with their appurtenances, for the further term of twenty-one years, to commence from the expiration of the term hereby granted; the same to be at the same yearly rent, payable in like manner, and under and subject to the like covenants, provisos, and agreements (except a covenant for further renewal), as are contained in these presents; such new lease, however, to be granted and valid on condition that the said C. D., his executors, administrators, or assigns, do execute a counterpart thereof, and also pay the said A. B., his executors, administrators, or assigns, the sum of five hundred dollars, at the time of executing said lease, as and by way of fine or premium for the renewal thereof.

to renew the
lease;

And also that in case the said premises shall, at any time during the said term, be destroyed or injured by an accidental fire, the said A. B., his executors, administrators, or assigns, shall and will forthwith, as soon as conveniently may be thereafter proceed to rebuild and repair the same in as good condition as the said premises were in before such fire, and that in the mean time, and until said premises are rebuilt and put in good and tenantable order, the rent hereby reserved shall cease.

and rebuild
in case of
fire.

In witness whereof, the parties to these presents have hereto set their respective hands and seals the day and year first above written.

Sealed and delivered }
in the presence of }

A. B. (L. s.)
C. D. (L. s.)

NO. XIV.

Agreement for Granting a Farming Lease.

Memorandum of an agreement made this — day of —, in the year —, between A. B., of —, of the one part, and C. D., of —, of the other part, whereby it is agreed that the said A. B. shall, on or before the first day of March, make and execute unto the said C. D., his executors, administrators, and assigns, a good and valid lease of all that messuage, piece or

parcel of land, situate, &c., with the appurtenances thereunto belonging, for the term of — years from the said first day of —, at the yearly rent of — dollars, payable half-yearly, clear of all deductions for taxes, or on any other account whatever; the first payment of said rent to be made on the first day of — next; and at and under the further yearly rent of — dollars for every acre, and so in proportion for a less quantity, of meadow or pasture ground which shall be ploughed or converted into tillage contrary to a covenant to be contained in said lease, as hereinafter directed; the first payment of said last mentioned rent to be made on the first half-yearly day after such conversion into tillage as aforesaid. And in the said lease there shall be contained covenants on the part of the said C. D., his executors, administrators, and assigns, to pay the aforesaid rents, and to pay all taxes and assessments; for doing all manner of repairs to the building, hedges, ditches, rail and other fences (the said A. B. providing upon the premises, or within two miles thereof, rough timber, bricks, tiles, and lime for the doing thereof, to be conveyed by the said C. D., his executors, administrators, or assigns); for permission for the said A. B., his heirs, or assigns, at all seasonable times to view the state of the premises; that the said C. D., his executors, administrators, or assigns, shall not plough or convert into tillage any of the closes of meadow or pasture ground, without the license of the said A. B., his heirs, or assigns, in writing, first obtained; that the said C. D., his executors, or administrators, shall not carry off from the farm any hay, straw, or other fodder, and that the said C. D., his executors, administrators, or assigns, shall spread on some part of the said lands, in a husband-like manner, all the dung, manure, and compost which shall arise from the said farm, and shall in all respects cultivate the same in a husband-like manner, and according to the usual course of husbandry practised in the neighborhood, and shall leave all the dung, manure, and compost of the last year for the use of the landlord, or succeeding tenants. That the said C. D., his executors, administrators, or assigns, shall not cut or flash any of the quick-hedge under three years' growth, and shall cut and flash those at seasonable times in the year, and, at the time of doing thereof, shall cleanse the ditches adjoining thereto, and guard and preserve the hedges which shall be so cut and flashed as aforesaid, from destruction or injury by cattle, and shall also, at all times, guard and preserve all young hedges and

young trees from the like destruction and injury. That the said C. D., his executors, administrators, or assigns, shall, in the summer immediately preceding the determination of the said term to be granted as aforesaid, prepare for seed, in a husband-like manner, such part of the land as shall be in a course of fallow, and fit to be sown with a crop the ensuing season, and lay down with clover seed and rye-grass twenty acres of the arable land which shall be then in tillage, sowing upon each acre thereof ten pounds of the best clover seed, and one bushel of the best rye-grass seed. And in the said lease there shall be contained a proviso for re-entry by the said A. B., his heirs, or assigns, in case of the non-payment of rent for the space of twenty days, or non-performance of the covenants, or in case the said C. D., his executors, administrators, or assigns, shall assign, underlet, or otherwise dispose of the said premises, or any part thereof, or do, commit, or suffer any act or deed, whereby or by means whereof the said premises, or any part thereof, shall be assigned, underlet, or disposed of, without the consent, in writing of the said A. B., his heirs, or assigns, first obtained. And there shall be contained covenants on the part of the said A. B., his heirs, and assigns, for quiet enjoyment. That the said A. B., his heirs, or assigns, shall, upon ten days' notice, provide and allow to the said C. D., his executors, administrators, and assigns upon the premises, or within two miles thereof, all such rough timber, bricks, tiles, and lime as shall be necessary for the repairs of the premises, the said materials to be conveyed at the expense of the said C. D., his executors, administrators, or assigns. That the said A. B., his heirs, and assigns, shall permit the said C. D., his executors, administrators, or assigns, to have the use of the great barn, the stable for four horses adjoining, and the stack-yard and farm-yard, until one month after the expiration or determination of the said term, for the convenience of thrashing out the last year's crops of corn and grain, and feeding his or their cattle with the straw and fodder, so that the same may be made into manure, to be left on the said premises as aforesaid; and also some convenient room in the farm-house for his or their servants to lodge and diet in, until the time aforesaid, without any recompense being made for the same respectively.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Sealed and delivered }
in the presence of }

A. B. (L. S.)
C. D. (L. S.)

NO. XV.

*A New York Manor Lease.*¹

Parties. This indenture, made the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and twenty-six, between Edward P. Livingston, and Elizabeth his wife, of Clermont, Columbia County, and State of New York, of the first part, and Bruce C. Smith, of Lexington, Greene County, and State aforesaid, of the second part, witnesseth: That the party aforesaid of the first part, for and in consideration of the rents and covenants hereinafter mentioned, which, on the part and behalf of the party aforesaid of the second part, are to be paid, done, observed, performed, fulfilled, and kept, hath demised, bargained, enfeoffed, set, and to farm let, and by these presents doth demise, set, and to farm let, unto the party aforesaid of the second part, his heirs, and assigns, all that certain parcel of land lying in the town of Lexington, county of Greene,

Premises. in great lot number twenty-one in the Hardenburge Patent, being in the subdivision number twelve of said lot, and formerly part of Benjamin Chamberlain's farm, beginning on the northerly side of Schoharry Kill and the iron-wood tree, cornered and marked VxC, and stones round it, runs from thence along the division line between this farm and Benjamin Chamberlain, north, thirty-two degrees and thirty minutes east, thirteen chains and forty-five links, to a stake and stones at the edge of the lowland, and north twenty-eight degrees east, sixty-five chains and fifty links, along a line of marked trees formerly run by George Stimson to an old beech-tree marked B, standing on the old line of marked trees, the bounds of a lot in possession of Richard Peck, thence along the same, north, forty-two degrees and thirty minutes east, one chain and eleven links to a stake and stones, twelve links north-east of the old beech corner tree, thence along the old marked line, south, fifty-seven degrees and thirty minutes, east, twelve chains to an old beech corner tree, thence along an old line of marked trees, the bounds of Samuel Adams's lot and Abraham Van Volkenburgh's lot, south thirty-two degrees and thirty minutes west, eighty-one chains to the said Schoharry Kill, to an old cornered maple-tree, standing

¹ For a history of these leases, see §§ 12, n., 261, 295, 370, 442.

one chain and sixty links south, forty-three degrees west from the south-west corner of Caleb Hyde's house, thence down the stream of the said Kill to the place of beginning, containing eighty acres, be the same more or less, being the farm heretofore leased to Jeremiah Martin, on the 29th of September, 1818. Together with all and singular the trees, woods, and underwoods, to be made use of on the premises, and nowhere else. Saving and always reserving to the party of the first part, their heirs and assigns for ever, all streams, creeks, and runs of water, and all mines, minerals, ores, and metals of every nature and kind, upon or within the farm hereby demised, standing, being, or to be found, with full and free ingress, egress, regress, and power and liberty at all times to search, dig, and carry away the same, or to manufacture the same thereupon, and, for that purpose, to make and erect mills, dams, and other buildings, and also to take and use all such timber, firewood, stone, and other materials, as may be found in any part of the said demised farm, proper and necessary for his or their use. But it is hereby provided, that for so much of the said demised farm as shall by these means become encumbered, or rendered useless to the party of the second part, there shall be deducted out of the yearly rents by these presents reserved a reasonable abatement, in proportion to the whole quantity of the said hereby demised farm, during the time that any part may be so encumbered or rendered useless. To have and to hold the said farm, land, and premises hereinbefore demised (saving, reserving, and excepting as aforesaid), unto the party aforesaid of the second part, his executors, administrators, and assigns for ever, from the day before the date of these presents; to the proper use, benefit, and behoof of the party aforesaid of the second part, his executors, administrators, and assigns, yielding and paying therefor, during the continuance of this present lease, yearly and every year, unto the party aforesaid of the first part, their heirs, or assigns, the yearly rent of seventeen and a half bushels of good, sweet, merchantable winter wheat, for the above-demised premises, to be delivered and paid by the party aforesaid of the second part, his heirs, or assigns, on the first day of every month of May, yearly, at such storehouse or place within fifty miles from the above-demised premises, and to such person as the party aforesaid of the first part, their heirs, executors, administrators, or assigns, shall from time to time, at pleasure, appoint or direct to receive the same; the first pay-

Reservations.

Proviso.

Habendum.

Yearly rent.

Right of re-
entry.

Covenant
against un-
derletting.

Covenant
to repair.

ment to be made on the first day of May, in the year of our Lord one thousand eight hundred and twenty-seven, which rent is to be paid without any deduction or abatement of or for any manner of taxes, charges, assessments, or impositions whatsoever, that have or shall be taxed, charged, assessed, or imposed upon the hereby demised premises, or any part thereof, or upon the party aforesaid of the second part, his heirs, or assigns, for or on respect thereof, by any power or authority whatsoever; provided always, that these presents are upon this condition, that if the said yearly rent, or any part thereof, shall be behind, and unpaid, or unperformed in any part or in all, by the space of twenty days next after any of the days appointed or to be appointed as aforesaid, for rendering, paying, or performing the same as aforesaid; or if the party aforesaid of the second part, his heirs or assigns, shall not take possession and improve the farm aforesaid within six months after date hereof, or leave the possession for the space of six months, or shall not observe, keep, and perform the several articles, covenants, and agreements in these presents particularly hereafter expressed, on his or their part to be observed, kept, and performed; that then, and in any or either of these cases, these presents, and the estate by these presents demised, or intended to be demised, are to be void, determine, and cease; and thereupon it shall and may be lawful to and for the party of the first part, their heirs, and assigns, into the said farm, land, and premises, or in any part, in the name of the whole, to re-enter, and have again, retain, repossess, and enjoy, as in their first former estate. And also in case of the party aforesaid of the second part, his heirs and assigns, or any of them, be minded and desirous hereafter to dispose of the said farm, or any part thereof, or to underlet the same, with the appurtenances, the orchards, fruit-trees, nurseries, dunghill, which shall be deemed parcel of the said farm, that then the party aforesaid of the second part, his heirs or assigns, shall not nor will not sell or dispose of, or underlet the same, before leave first had and obtained, under the hand and seal of the party aforesaid of the first part, their executors, administrators, or assigns. Also that the said party of the second part shall and will from time to time, and at all times during the term hereby demised, keep, maintain, and preserve the house, barn, barracks, buildings, fences, and enclosures, made or to be made and erected on the hereby demised farm, in good and sufficient repair. Also that the party

aforesaid of the second part, his heirs, or assigns, shall, in the first year, strew apple-seed, or pomace upon a patch of land on said farm for a nursery, well prepared for that purpose, of at least fifty feet square, to the intent that, within six years, there be planted a regular orchard of one hundred apple-trees at least, at thirty-six feet asunder, and as many of them as may happen to die, others in their stead to be replaced, so that the number of one hundred like trees at least be complete and planted out, and enclosed with a good fence for their safety. Also that the party aforesaid of the second part, his heirs, or assigns, shall not, by themselves or procurement, peel and bark, for tanner's use, off or from any tree standing or laying down on the said farm; or, by his or their privity, suffer any wood to be disposed of or burnt into coal for furnace, forge, or bloomery use, or into ashes for any potash work; or shall the party aforesaid of the second part, his heirs, or assigns, take in or join any other person or persons in conjunction, to farm on shares, or dropping. And also that the party aforesaid of the second part, his executors, administrators, and assigns, shall from time to time hereafter be subject to all reasonable orders, as regulating fences, laying out paths and roads, and to amend and repair the same, when necessarily devised by the party aforesaid of the first part. And this lease is upon the express condition that the aforesaid land, before it shall be sold, assigned, or underlet, by the said party of the second part, his heirs, or assigns, shall be fixed at the price he or they mean to take, and the first offer thereof, at the said price, shall be made to the said party of the first part, their heirs, or assigns; and also, when sold, underlet, or mortgaged, or in any way disposed of otherwise than by will or descent, that the person so taking the same shall take a new lease from the said party of the first part, their heirs, or assigns, subject to the same rents, covenants, and conditions contained in this lease, together with a new covenant and condition in all things similar to this; it being declared to be the intention hereof, that this lease is to be renewed upon every sale, assignment, or underletting, as long as the term hereby granted shall continue, and shall pay to the said party of the first part, their heirs, or assigns, one-tenth part of the sale-money, which shall be considered as a condition binding the land, as also all other covenants and conditions herein contained, and for a breach of any of which the said party of the first part, their heirs, or assigns, may re-enter and recover the said land, as if no lease had been granted.

Covenant
for cultivation.

Restraints
upon alienation.

In witness whereof, the parties to these presents have interchangeably set their hands and seals, the day and year first above written.

EDWARD P. LIVINGSTON.

ELIZABETH S. LIVINGSTON.

BRUCE C. SMITH.

Sealed and delivered }
in the presence of }

HORACE STEVENS.

NO. XVI.

A Building Lease.

Parties, &c., This indenture, made, &c., between A. B., &c., of the one part, and C. D. of the other part, witnesseth : That the said A. B., for and in consideration of the rents, covenants, and agreements hereafter reserved and contained, by and on the part and behalf of the said C. D., his executors, administrators, and assigns, to be paid, done, and performed, hath demised, leased, set, and to farm let, and by these presents doth demise, lease, set, and to farm let unto the said C. D., his executors, administrators, and assigns, all that piece or parcel of ground situate, lying, and being on, &c., in the said —, containing in breadth on the north side thereof —, and in depth on the east side thereof —, be the same more or less, and on the west side thereof —, east —, and from thence south —, and from thence east, be the same more or less, together with the messuages or tenements, and other the erections and buildings thereon, which the said C. D. shall have full liberty to pull down, and to take to and for his own use ; which said piece or parcel of ground abuts north on — aforesaid, south on gardens to some houses on the north side of —, belonging to the said A. B., now on lease to —, east on buildings, &c., and west &c., and is more fully delineated and described in the plan or ground plot thereof, in the margin of these presents, together with all erections and buildings to be erected and built thereon, and all ways, paths, passages, drains, water, water-courses, easements, profits, commodities, and appurtenances, whatsoever belonging and which shall belong to the said hereby demised premises, or any part or parcel thereof, to have and for the term ; to hold the said piece or parcel of ground, messuages, or tene-

ments, erections, buildings, and premises hereby demised, or intended so to be, with their and every of their appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — day of — last past, before the date thereof, for, and during and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended, yielding and paying therefor, for the first year of the said term hereby demised, the rent of a peppercorn on the last day thereof, if demanded, and yielding and paying therefor yearly and every year, for and during the remaining years of the said term hereby demised, unto the said A. B., his heirs and assigns, the yearly rent or sum of — of lawful money of the United States of America, by half-yearly payments, on the — and — in each year, by even and equal portions, the first payment thereof to begin and be made on —, in the year of our Lord —, the said several rents to be paid and payable from time to time, on the several days aforesaid during the said term, free and clear of all rates, taxes, charges, assessments, and payments whatsoever, taxed, charged, assessed, or imposed upon the said hereby leased premises, or any part thereof, by any lawful authority howsoever, during the term hereby granted.

reservation
of rent;

And the said C. D., for himself, his heirs, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said A. B., his heirs, and assigns, by these presents, in manner following (that is to say), that the said C. D., his heirs, executors, administrators, and assigns, shall and will, yearly, and every year during the last years of the said term hereby granted, well and truly pay, or cause to be paid unto the said A. B., his heirs and assigns, the said yearly rent or sum of —, of lawful money of the United States, on the several days and times, and in the manner hereinbefore limited and appointed for payment thereof, without making any deduction or abatement thereout, for or in respect of any rates, taxes, assessments, duties, charges, or impositions whatsoever, taxed, charged, assessed, or imposed upon the said hereby-demised premises, or any part thereof, during the said term hereby granted, all which rates, taxes, assessments, duties, charges, or impositions he, the said C. D., his executors, administrators, or assigns shall and will bear, pay, and discharge, and therefore and therefrom acquit, save harmless, and keep indemnified the said A. B., his heirs and assigns. And that he, the said C. D.,

Lessee cov-
enants to
pay rent;

to pay
taxes, &c.;

his executors, administrators, or assigns, shall and will, before the expiration of the first year of the term hereby granted, at his and their own proper costs and charges, erect, build, complete, and in a workman-like manner finish, one or more good and substantial brick messuages or tenements, upon some part of the ground hereby demised, and shall and will lay out and expend therein the sum of — or upwards, and also that he, the said C. D., his executors, administrators, and assigns, shall and will from time to time and at all times, from and after the said messuage or tenement, erections and buildings on the said piece of ground hereby demised, shall be respectively completed and finished, during the remainder of the said term hereby granted, when, where, and as often as need or occasion shall be and require, at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, pave, purge, scour, cleanse, empty, amend, and keep the said messuage or tenement, messuages or tenements, erections, and buildings, and all the walls, rails, rights, pavements, grates, privies, sinks, drains, and watercourses thereunto belonging, and which shall belong unto the same, in, by, and with all and all manner of needful and necessary reparations, cleansings, and amendments whatsoever. And that he, the said C. D., his executors, administrators, and assigns shall not nor will, during the said term hereby granted, permit or suffer any person or persons to use, exercise, or carry on, in and upon the said hereby-demised premises or any part thereof, any trade or business which may be nauseous or offensive, or grow to the annoyance, prejudice, or disturbance of any of the other tenants of the said A. B., near adjoining thereto, and the said messuage of tenement, messuages or tenements, erections, buildings, and premises, with the walls, pavements, sewers, and drains belonging thereto, being in every respect so well and sufficiently repaired, upheld, supported, sustained, maintained, paved, purged, scoured, cleansed, emptied, amended, and kept, shall and will, at the expiration or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender, and yield up unto the said A. B., his heirs, and assigns, together with all the doors, locks, keys, bolts, bars, wainscots, chimney-pieces, slabs, foot-pieces, windows, window-shutters, partitions, dressers, shelves, pumps, water-pipes, rails, and all other things which shall be any ways fixed and fastened to, and shall be standing, being, and set up in and upon the said premises

to erect
houses;

to repair and
maintain the
same;

not to suffer
offensive
trades to be
carried on
upon the
premises;

surrender at
the end of
the term all
buildings,
fixtures,
&c.;

hereby demised, or any part thereof, within the last years of the said term hereby granted. And that the said C. D., his executors, administrators, and assigns, shall and will, at his and their own proper costs and charges, from time to time sufficiently insure all and every the messuages or tenements, erections, and buildings, which shall be erected and built upon the said piece or parcel of ground hereby demised, or any part thereof, from casualties by fire, during the then remainder of the said term hereby granted, in some or one of the public offices kept for that purpose in New York or Boston; and in case the said message or tenements, erections, and buildings, or any of them, or any part of any of them, shall, at any time or times during the said term, be burnt down, destroyed, or damaged by fire, shall and will, from time to time, immediately afterwards rebuild, or well and sufficiently repair, the same. And further, that it shall and may be lawful to and for the said A. B., his heirs, and assigns, or any of them, with workmen or others, in his, their, or any of their company, or without, to enter or come into and upon the said demised premises, and every part thereof, at seasonable and convenient times, in the daytime, as well at any time or times during the last seven years of the said term hereby granted, to make an inventory or schedule of the several fixtures and things then standing and being in and upon the said hereby-demised premises, which are to be left, at the end of the said term, to and for the use of the said A. B., his heirs and assigns, pursuant to the covenant hereinbefore in that behalf contained, as also twice, or oftener, in every year during the said term hereby granted, to view, search, and see the defects and want of reparation of the said premises, and all defects and want of reparations, which, upon every or any such view or search, shall be from time to time found, to give or leave notice or warning thereof, in writing, at or upon the said demised premises, unto and for the said C. D., his executors, administrators, or assigns, to repair and amend the same. And that the said C. D., his executors, administrators, or assigns, shall and will, within three months next after every such notice or warning shall be given or left, at his and their own proper costs and charges, well and sufficiently repair, amend, and make good all and every the defects and want of reparations, whereof such notice or warning shall be so given or left as aforesaid. Provided always, nevertheless, and these presents are upon this condition, that if the said yearly rent, or

to keep the
premises
insured;

and rebuild
in case of
fire;

permit the
lessor to
examine the
premises;

and that
lessee will
repair;

proviso for
re-entry for
a breach of
any covenant
on the part
of lessee ;

sum of — hereby reserved, or any part thereof, shall be behind and unpaid, by the space of — days next after either of the said days of payment, whereon the same ought to be paid as aforesaid (being lawfully demanded), or if the said C. D., his executors, administrators, or assigns, shall not well and truly observe, perform, fulfil, and keep all and every the covenants, articles, clauses, conditions, and agreements in these presents expressed and contained, on his and their part and behalf to be performed and kept, according to the true intent and meaning thereof, then and from thenceforth, in either of the said cases, it shall and may be lawful to and for the said A. B., his heirs, and assigns, into and upon the said demised premises, or any part thereof in the name of the whole, wholly to re-enter, and the same to have again, retain, repossess, and enjoy as in his and their first and former estate, and the said C. D., his executors, administrators, or assigns, and all other tenants or occupiers of the said premises, thereout and from thence utterly to expel, put out, and amove ; and that from and after such re-entry made, this present lease, and every clause, article, and thing herein contained on the lessor's part and behalf, from thenceforth to be done and performed, shall cease, determine, and be utterly void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

the lease
thereupon
to become
void.

Lessor cov-
enants for
quiet enjoy-
ment.

And the said A. B., for himself, his heirs, and assigns, doth hereby covenant, promise, and agree, to and with the said C. D., his heirs, executors, administrators, and assigns, paying the said yearly rent hereby reserved, in manner and form aforesaid, and observing, performing, and keeping all and singular the covenants and agreements hereinbefore mentioned, on his and their parts and behalf to be performed and kept, shall and may lawfully, peaceably, and quietly have, hold, occupy, possess, and enjoy the said piece or parcel of ground and premises hereby demised, with their and every of their appurtenances, for and during the said term of — years hereby granted, without any lawful let, trouble, denial, or interruption, of or by the said A. B., his heirs, or assigns, or any other person or persons lawfully claiming, or to claim by, from, or under him, them, or any of them.

In witness, &c.

NO. XVII.

An Indorsement for continuing a Lease for a longer Term, after the Expiration of the Present.

This indenture, &c., between the within-named A. B., of the one part, and the within-named C. D., of the other part, witnesseth; That for and in consideration of the rent hereby reserved, and of the covenants, conditions, and agreements respectively hereinafter contained, which, on the part of the said C. D., his executors, administrators, and assigns are to be paid, done, and performed, the said A. B. hath demised, leased, set, and to farm let unto the said C. D., his executors, administrators, and assigns, all that piece or parcel of ground, with the messuage or tenement thereon erected and built, and all and singular other the premises respectively comprised in the within written lease, and thereby demised to the said C. D. (except as therein is excepted), to have and to hold the said piece or parcel of ground, and messuage or tenement, and all and singular other the premises hereby leased, let, and to farm let, or mentioned or intended so to be (except as aforesaid), unto the said C. D., his executors, administrators, and assigns, from the — day of —, which will be in the year of our Lord —, and when the said within written lease will expire, for and during and unto the full end and term of — years longer, from thence next ensuing, and fully to be complete and ended, subject to and under the like rent, and payable in like manner as is within mentioned, for and in respect of the rent reserved in and by the said within written lease, and subject to the like power of entry, as well on the non-payment of rent, as on the happening of any of the other incidents mentioned in the within written proviso, or condition of re-entry, and it is hereby declared and agreed, by and between the said parties to these presents, that they and their respective heirs, executors, administrators, and assigns, shall and will, by these presents, during the continuance of the additional term of — years hereby granted, stand and be bound, for and in respect of the said hereby demised premises, with the appurtenances, in such and the like covenants, conditions, and agreements respectively, as they the said parties, and their respective heirs, executors, administrators, and assigns, do now stand bound in and by the said within lease, for and during the now residue unex-

Continuance
of lease by
indorsement.

Agree to be
bound by all
covenants.

pired of the within-mentioned term hereby granted, it being the intent and meaning thereof that this present indorsed lease, and the additional term hereby granted, shall be upon such and the like footing, and all the covenants, clauses, conditions, and agreements respectively therein contained, be equally available, take place, and have the like force and effect, to all intents and purposes, as if every article, clause, matter, and thing contained in the said within lease, were inserted and contained in this present indenture.

In witness, &c.

NO. XVIII.

Underlease by a Mortgagee and Mortgagor of a House and Premises, with a Provision for Payment of the Rent to the Mortgagor.

Parties.

This indenture, made the — day of —, 18 —, between A. B., of — (mortgagee of the messuage or tenement and premises hereinafter described and demised, or intended so to be), of the first part, C. D., of — (mortgagor of the same messuage or tenement and premises), of the second part, and [lessee], of —, of the third part, witnesseth: That in consideration of the rent, covenants, and agreements hereinafter reserved and contained, and on the part of the said [lessee], his executors, administrators, and assigns to be paid, observed, and performed, he, the said [mortgagee], with the consent and approbation of the said [mortgagor], and according to his estate and interest in the premises, doth by these presents demise and lease, and the said [mortgagor] doth by these presents demise, lease, ratify, and confirm unto the said [lessee], his executors, administrators, and assigns, all that messuage or tenement, &c., together with all out-houses, buildings, &c., to have and to hold, &c., yielding and paying therefor yearly, during the said term, the yearly rent of —, of lawful money of —, unto the said [mortgagee], his executors, administrators, and assigns,¹ subject to such equity of redemption as the said demised premises are now subject or liable to; and subject also to the proviso or agreement herein-

Mortgagee
demises, and
mortgagor
demises and
confirms.
Parcels and
general
words.
Habendum.
Reddendum.

¹ The mortgage was upon a term for years, the mortgagor being but a termor.

after contained, in respect to the intermediate payment of the said rent, until such notice as is hereinafter mentioned; such yearly rent of — to be paid by quarterly payments, on the 25th day of March, the 24th day of June, the 29th day of September and the 25th day of December, clear of the sewers-rate, and all and all manner of taxes, assessments, rates, and impositions whatsoever, now or hereafter to be charged, assessed, or imposed upon the said premises hereby demised, or on the said yearly rent hereby reserved, or on the said [*mortgagee* and *mortgagor*], or either of them, their or either of their heirs, executors, administrators, or assigns, in respect thereof; Provided always, and it is hereby agreed and declared, that in the mean time, and until the said [*mortgagee*], his executors, administrators, or assigns, shall require to have the receipt of the rents and profits of the said premises hereby demised, or intended so to be, and shall give unto the said [*lessee*], his executors, administrators, or assigns, or leave at the same premises notice, in writing, requiring the said [*lessee*], his executors, administrators, or assigns to pay the said rent hereby reserved to him, the said [*mortgagee*], his executors, administrators, or assigns, the same rent shall or may be paid to the said [*mortgagor*], his executors, administrators, or assigns; and if, at any time previously to such notice having been given or left as aforesaid, the same rent, or any part thereof, be unpaid for the space of fourteen days after the respective days or times whereon the same ought to be paid as aforesaid, then and in such case, and so often as the same shall happen (although no lawful demand shall have been made thereof), it shall be lawful for the said [*mortgagor*], his executors, administrators, or assigns, to enter into and distrain upon the said premises hereby demised for the said yearly rent, or so much thereof as shall then be in arrear, and the distress and distresses then and there made to take, lead, carry away, and impound, and in pound to detain and keep, and in due time afterwards to sell or dispose of, or otherwise to act therein according to the law, to the intent that, by the ways and means aforesaid, he, the said [*mortgagor*], his executors, administrators, and assigns shall and may be fully paid and satisfied the arrears of the said rent, and also all costs, charges, and expenses which shall be sustained or incurred, in consequence of any such distress or distresses. And the said [*lessee*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagee*], his executors, administra-

Proviso for payment of rent to mortgagor till notice by mortgagee.

Power of distress to mortgagor.

Covenants by lessee;

tors, and assigns, and also separately with the said [*mortgagor*], his executors, administrators, and assigns, in manner following: that is to say, that he, the said [*lessee*], his executors, administrators, and assigns shall and will yearly, during the continuance of the said term hereby granted, pay unto the said [*mortgagor*], his executors, administrators, or assigns, until such notice shall have been given or left as aforesaid, and afterwards to the said [*mortgagee*], his executors, administrators, and assigns, the said yearly rent of —, on the respective days, and in manner hereinbefore appointed for payment thereof, without any deduction whatsoever. And also shall, and will pay the sewers-rate, and all manner of other taxes, assessments, rates, and impositions whatsoever, which now are, or hereafter, during the said term, shall be assessed, rated, or imposed on the said messuage or tenement and premises, or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the said [*mortgagee*] and [*mortgagor*], or either of them, their, or either of their executors, administrators, or assigns, on account thereof. And will also pay, on demand, unto the said [*mortgagee*] and [*mortgagor*] respectively, and their respective executors, administrators, and assigns, all premiums, costs, charges, and expenses, and all and every sum and sums of money which the said [*mortgagee*] and [*mortgagor*] respectively, or their respective executors, administrators, or assigns shall from time to time, during the said term, expend for insuring the said messuage or tenement and premises, from loss or damage by fire, to the extent of —; and that the amount of the said premiums, costs, charges, and expenses shall also be recoverable by distress on the said premises, as and in the nature of rent reserved upon a lease for years. And also, that in case any loss or damage by fire shall, during the said term hereby granted, happen to the said messuage or tenement and premises, or any part thereof, and the money received by the said [*mortgagee*] and [*mortgagor*], or either of them, their, or either of their executors, administrators, or assigns, under or by virtue of the policy or policies of insurance thereon, shall not be sufficient, and so far as the same will not extend to rebuild, repair, or reinstate the said messuage or tenement, erections, and buildings, then the said [*lessee*], his executors, administrators, or assigns shall and will also pay unto such of them, the said [*mortgagee*] and [*mortgagor*], or his executors, administrators, or assigns as shall rebuild, repair, and reinstate the said messuage or tenement,

to pay rent to mortgagor till notice, and afterwards to mortgagee;

to pay rates and taxes;

and premiums of insurance effected by mortgagee or mortgagor.

Limit of amount recoverable by distress.

If insurance money insufficient to repair damages, lessee to pay difference.

erections, and buildings, the difference in amount between the sum recovered under or by virtue of the said policy or policies of insurance, and the sum expended in so rebuilding, repairing, and reinstating the said messuage or tenement, erections, buildings, and premises, or any part thereof. And also, &c. [*add here a covenant by lessee to repair and cleanse, &c.*]. And the same messuage or tenement and premises, with the appurtenances, so being in all parts and things from time to time well and sufficiently repaired, upheld, sustained, &c. [*as in the covenant to repair*], shall and will peaceably and quietly leave, surrender, and yield up, at the end of the said term, unto the said [*mortgagee*], his executors, administrators, or assigns, in case his aforesaid mortgage shall be then subsisting, but otherwise to the said [*mortgagor*], his executors, administrators, or assigns; together with all such fixtures thereon or thereto belonging as are usually deemed landlord's fixtures. And further, that it shall be lawful for the said [*mortgagee*] and [*mortgagor*] respectively, and their respective executors, administrators, and assigns, and also for the superior landlord or landlords of the said messuage or tenements and premises, and his or their surveyor or surveyors, agents, or servants, twice in every year, &c. [*here insert power to lessors to enter and see state of repairs of the premises, and a covenant by lessee to repair, according to notice.*] And also, &c. [*covenant by lessee not to carry on any offensive business, nor assign without license.*] Provided always, &c. [*add proviso for the re-entry of the mortgagee, his executors, administrators, and assigns; and also of the mortgagor, his executors, administrators, and assigns, on non-payment of rent, or non-performance of covenants; and a covenant by the mortgagor for the lessee's quiet enjoyment, on paying the rent reserved, and performing and observing the covenants by him to be performed and observed, and add*], and also saved harmless and indemnified from the rent and covenants reserved and contained in a certain indenture of lease, bearing date on or about the — day of —, in the year —, and made, or expressed to be made, between —, of the one part, and the said [*mortgagor*] of the other part, whereby the said — did, for the considerations therein mentioned, demise and lease the said messuage or tenement and premises hereby demised, unto the said [*mortgagor*], his executors, administrators, and assigns, from the day of the date thereof, for the full term of forty years thence next ensuing; and free from all claims and demands in respect thereof.

Covenant to repair; and to yield up at end of term.

Power of re-entry to inspect repairs, &c. Not to carry on offensive businesses, nor assign without license. Proviso for lessor's re-entry on non-payment of rent &c. Covenant by mortgagor for lessee's quiet enjoyment and indemnity against original lessor.

Covenant by mortgagor to expend insurance money on repairs.

Covenant by mortgagee for lessee's quiet enjoyment.
Covenant by lessee to advance renewal fines;

not exceeding —.

Covenant by mortgagor to assign or underlet renewed term to lessee, for securing repayment of fines, &c., and interest.

And also that he, the said [*mortgagor*], his executors, administrators, or assigns shall and will, in case of any loss or damage by fire happening to the said messuage or tenement and premises, immediately on receipt or recovery of the money due upon or by virtue of any policy or policies of insurance of the said premises, fully and faithfully lay out and expend the same, so far as the same will extend, in rebuilding, repairing, and reinstating the said messuage or tenement and premises hereby demised. And the said [*mortgagee*] doth hereby, &c. [*insert covenant by the mortgagee for the lessee's quiet enjoyment on payment of rent, &c., as against him, the mortgagee, and persons claiming under him*]. And the said [*lessee*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagor*], his executors, administrators, and assigns, that in case the said — shall, at any time during the continuance of this present demise, be willing to renew the said lease, bearing date on or about the said — day of — for a further term of years, he, the said [*lessee*], his executors, administrators, or assigns will, at the request, in writing, of the said [*mortgagor*], his executors, administrators, or assigns, pay to the said —, or their proper officer duly authorized to receive the same, the fine that shall be imposed upon such renewal of the said last-mentioned lease, and also the expenses of the same renewal, so that such fine and expenses do not exceed together the sum of — of lawful money of —, and if the same fine and expenses together shall exceed that sum, then will, at such request as aforesaid, pay so much of the same fine and expenses as shall amount to that sum. And the said [*mortgagor*] doth hereby further, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessee*], his executors, administrators, and assigns, that upon payment of any such fine and expenses of renewal as aforesaid, or of such part thereof as aforesaid, by the said [*lessee*], his executors, administrators, or assigns, he, the said [*mortgagor*], his executors, administrators, or assigns shall and will, immediately upon such renewal, at his or their own costs and charges, effectually assign or demise, at the option of the said [*lessee*], his executors, administrators, or assigns, the premises to be comprised in such renewed lease, with their appurtenances, unto the persons or person paying the same fine and expenses of renewal, or such part thereof as aforesaid, their or his executors, administrators, or assigns, for the term, or for all the term except the last day

thereof, for which the same premises shall have been granted by such new lease, by way of mortgage, for securing the repayment to the said [*lessee*], his executors, administrators, or assigns, of the principal sum or sums so advanced or paid, for such renewal fine and expenses of renewal as aforesaid, with interest thereon, after the rate of — per centum per annum, and subject thereto, upon trust for the said [*mortgagor*], his executors, administrators, and assigns, according to his right and interest in the premises, to be comprised in any such new lease.

In witness, &c.

NO. XIX.

Lease of a Cotton Mill, Machinery, and Gear, &c., for a term of Years, the Lessors to have the option of purchasing at the end of the term.

This indenture, made the — day of —, in the year of Parties.
our Lord —, between [*lessors*], of —, of the one part, and [*lessee*], of —, of the other part, witnesseth: That in consid- Testatum.
eration of the rents and covenants hereinafter reserved and contained, and on the part of the said [*lessee*], his executors, administrators, and assigns to be paid and performed, he, the said [*lessor*], doth by these presents demise and lease unto the said [*lessee*], his executors, administrators, and assigns, all that Parcels.
cotton-spinning mill, with the engine-house, steam-engine, boilers, machinery, running gear, fixtures, and other the appurtenances thereto respectively belonging, of him, the said [*lessor*], as the same premises are now used and let in the way of room and power, to the said [*lessee*]; and also all those several buildings used and occupied by the said several occupiers of the said mill, as storehouses or otherwise, and all the vacant ground adjoining or near the said premises; and also all those twelve tenements or cottages, situate and adjoining near to the said mill, and now in the several occupations of —, &c., or some or one of them; all which premises are situate at or near —, in the town of — aforesaid, and are called or known by the name of The Lower Mill; together with all houses, out-houses, edifices, buildings, roads, ways, paths, passages, watercourses, pumps, and wells of water, culverts, and especially the culvert or tunnel by which the said mill and engine are supplied with

Exceptions
of mines,
and right of
working.

on payment
for damage
to lessee;
and reserving
right of entry
to inspect
premises.

Habendum.

Subject to
chief rent,
&c.
Reddendum
of fixed rent,
except in
case of fire;

quarterly.

Covenant by
lessee to pay
rent, except
in case of
fire.

water from the adjoining brook or rivulet, easement, privileges, rights, members, and appurtenances whatsoever to the same premises, or any part thereof, belonging or appertaining, or now used and occupied therewith. Except and always reserved out of this present demise unto the said [*lessor*], his heirs, and assigns, all mines of coal, iron, lead, or other minerals, and all quarries of stone or slate, and beds of clay, within or under the said demised premises, with liberty for him and them, and his and their agents and workmen, at all times during this demise, to dig for, get, smelt, and work any such mine, minerals, quarries, and beds of clay, and to lead and carry away the same with carts and carriages over any part of the said demised premises, making reasonable compensation to the said [*lessee*], his executors, administrators, or assigns, or the damage he or they may thereby sustain; and also saving and reserving unto the said [*lessor*], his heirs, or assigns, and his or their agent or agents, the liberty of entering upon the said premises hereby demised, four times in the year, at seasonable times in the daytime, for the purpose of viewing the state and condition thereof. To have and to hold the said mill, engine-house, steam-engine, machinery, running gear, fixtures, cottages, buildings, vacant ground, hereditaments, and all and singular other the premises hereby demised, or intended so to be, with their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the — day of — last past, for the term of seven years thence next ensuing (subject to the payment of the yearly chief rent of —, hereinafter particularly mentioned); yielding and paying therefor, yearly and every year during the said term (except only in case of fire, as hereinafter mentioned), for and in respect of the said premises, unto the said [*lessor*], his heirs, and assigns, the clear yearly rent of —, of lawful money of —, by four equal quarterly payments, on the twenty-fourth day of June, the twenty-fourth day of September, the twenty-fourth day of December, and the twenty-fourth day of March, in each year; the first payment to begin and be made on the twenty-fourth day of June now next ensuing. And the said [*lessee*], doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessor*], his heirs, and assigns, that he, the said [*lessee*], his executors, administrators, or assigns shall and will, during the said term (except only in case of fire, as hereinafter mentioned), well and truly pay unto the said [*lessor*], his heirs, and

assigns, the said yearly rent of —, at the days and in manner hereinbefore appointed for payment thereof. And also that he or they shall and will, over and besides the said yearly rent, during the said term, pay, satisfy, and discharge unto —, of —, his heirs, and assigns, the annual chief rent of —, payable to him and them out of the said demised premises on the — day of —, in each year; and also a certain outpayment, not exceeding — annually, to be payable on the same day to Messrs. —, of —, bankers, or such other person or persons as shall be entitled to receive the same, for the privilege of passing and continuing the culvert or tunnel hereinbefore mentioned under or through their property to the said brook; and shall and will save harmless the said [*lessor*], his heirs, executors, administrators, and assigns from the same chief rent and outpayment respectively, and from all suits and damages in consequence of the non-payment thereof respectively. And also that he, the said [*lessee*], his executors, administrators, or assigns shall and will from time to time, and at all times during this demise, pay, satisfy, and discharge all township, county, and other taxes, rates, duties, and assessments whatsoever, that shall be taxed, rated, assessed, charged, or imposed upon, or in respect of, the said premises hereby demised, or any part thereof, or the owners or occupiers thereof. And also that he, the said [*lessee*], his executors, administrators, or assigns shall and will, at his and their own expense, during this demise, when and so often as occasion shall require (damage by accidental fire only excepted), substantially maintain, point, glaze, paint, amend, and keep the whole of the said cotton-mill, engine-house, engine, machinery, running gear, cottages, and premises hereby demised, and the roofs, windows, doors, and wood and iron work thereof respectively, and all and singular the out-houses, stables, gates, walls, fences, watercourses, roads, and appurtenances whatsoever thereto belonging, in good, substantial, and complete tenantable repair and condition; and the same, so painted, amended, and kept in such complete repair and condition (reasonable wear and tear only excepted), shall and will, at the expiration or the sooner determination of this demise, peaceably and quietly surrender and yield up unto the said [*lessor*], his heirs, or assigns. And also that he, the said [*lessee*], his executors, administrators, or assigns shall and will within twelve months from the date hereof, lay out and expend the sum of —, at the least, in substantial repairs of the said

To pay chief rent;

and a yearly sum to a stranger, for use of culvert;

and indemnify lessor therefrom.

To repair except in case of fire;

and quietly yield up at end of term.

To expend a certain sum in repairs within twelve months.

mill, to the satisfaction of the said [*lessor*], his heirs, or assigns; and particularly shall and will paint the whole of the outside wood-work of the said mill, as part of such repairs.

Proviso for re-entry, on non-payment of rent, &c.

Provided always, that if it shall happen that the said yearly rent hereby reserved, or any part thereof, shall be behind by the space of twenty-one days next after any of the said days whereon the same ought to be paid as aforesaid, or if the said [*lessee*], his executors, administrators, or assigns, shall not, in all things, keep and observe all and every the covenants and agreements herein contained, on his or their part to be observed and kept, then it shall be lawful for the said [*lessor*], his heirs, or assigns, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in their first and former state.

Lessee may remove newly erected engines at end of term, or be paid for them by lessor.

Provided also, that if, during the continuance of this demise, the said [*lessee*], his executors, administrators, or assigns shall put up and erect in and about the said mill and premises hereby demised, any shafts, machinery, or fixtures, other than what are now there, and which are particularly mentioned and described in the schedule thereof indorsed on these presents, he or they shall be at liberty, on the expiration or other sooner determination of this demise, either to remove the same (making good any damage to be occasioned by such removal), or at the option of the said [*lessor*], his heirs, or assigns, be paid by him or them such sums of money for the same as two indifferent persons, one to be chosen by each party, or their umpire, shall award and affix. Provided also, that unless the said [*lessor*], his heirs, or assigns shall omit to give to the said [*lessee*], his executors, administrators, or assigns, three calendar months' notice, in writing, previously to the expiration or other sooner determination of the said term (such notice to be left at the said mill), expressing his or their intent to become the purchaser or purchasers thereof, he or they shall be deemed to have declined such purchase.

Covenant for lessee's quiet enjoyment.

And the said [*lessor*], doth hereby, for himself, his heirs, and assigns, covenant with the said [*lessee*], his executors, administrators, and assigns, that he or they, paying the rent and performing the several covenants and agreements hereinbefore reserved and contained, and on his and their part to be paid and performed, shall and may peaceably and quietly have, hold, occupy, use, and enjoy the said premises hereby demised, with their appurtenances (especially the said culvert or tunnel for supplying the

said mill with water), during the said term hereby granted, without any interruption, suit, or disturbance from or by the said [*lessor*], his heirs, or assigns, or any person or persons claiming or to claim by, from, through, or under him, them, or any of them. Provided always, and it is hereby further declared and agreed, that in case the said mill, engine-house, steam-engine, machinery, fixtures, cottages, buildings, hereditaments, and all and singular other the premises hereinbefore described, or any part or parts thereof, shall, at any time or times during the said term hereby granted, happen to be destroyed or damaged by fire, so as to render the same unfit for the spinning of cotton, or uninhabitable, then and in such case, the rent hereinbefore reserved for the same, or a just and proportional part thereof, according to the nature or extent of the injury sustained, shall be suspended or abated until the said premises shall have been rebuilt or repaired by the said [*lessor*], his heirs, or assigns, and be put in a fit state and condition for habitation, or for carrying on the spinning or manufacturing of cotton, for which the same demised premises are now used; and in case of any dispute or difference between the parties interested therein, with respect to the time of such suspension, or the amount of such abatement respectively, the same shall, from time to time and at all times, be referred to the arbitrament and determination of three indifferent persons, to be named or chosen as aforesaid.

Proviso for
suspension of
rent, in case
of fire, till
premises
restored by
lessor.

In witness, &c.

NO. XX.

Assignment of a Lease under Seal.

This indenture, made the — day of —, in the year 1844, between C. D., of —, merchant, of the first part, and E. F., of said city, merchant, of the second part. Whereas in and by a certain indenture of lease, bearing date the — day of —, in the year 1844, made between A. B., of —, of the one part, and the said C. D. of the other part; he, the said A. B., for the considerations therein mentioned, did grant, lease, &c., all that certain messuage, &c. To hold unto the said C. D., his executors, administrators, and assigns, from the

— day of —, in the year 1844, for and during the whole term of — years from thence next ensuing, and fully to be complete and ended, at and under the yearly rent of — dollars, payable, &c., as in and by the said indenture of lease, on reference thereto, will more fully appear. Now this indenture witnesseth that the said C. D., for and in consideration of the sum of — dollars, lawful money of the United States, to him in hand paid by the said E. F., at or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said E. F., his executors, administrators, and assigns, all the said messuage or tenement and premises above mentioned, and every part and parcel thereof, with the appurtenances; and also all the estate, right, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever of the said C. D., of, in, and to the same, and every part and parcel thereof, together with the said indenture of lease itself. To have and to hold the said messuage or tenement and premises above mentioned, and hereby granted and assigned, and every part and parcel thereof, with the appurtenances, unto the said E. F., his executors, administrators, and assigns, for and during all the rest, residue, and remainder yet to come and unexpired of the said term of years in and by the said indenture of lease granted, in as full, large, and ample a manner, to all intents and purposes, as the said C. D., his executors, administrators, or assigns now holds, or may at any time hold, and enjoy the same, by virtue of the said indenture of lease. Subject, nevertheless, to the several rents, covenants, conditions, and agreements in the said indenture of lease reserved and contained.

In witness whereof, &c.

NO. XXI.

An Assignment of a Leasehold Interest, by Deed-poll, indorsed on the Lease.

Know all men by these presents, that I, the within-named C. D., for and in consideration of the sum of —, of lawful

money of the United States, to me in hand paid by G. F., of —, gentleman, at or before the ensealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have bargained, sold, set over, and assigned unto the said G. F., all and singular the messuage or tenement, yard, garden, coach-house, stables, out-houses, and hereditaments, in and by the within written indenture demised or mentioned so to be, with their appurtenances, and also all that small garden, at the end of and adjoining to the aforesaid garden, with the summer-house and mount, which were leased or agreed to be leased to me, by the within named A. B., by agreement between us, dated the day next before the date hereof, for twenty-one years, or such other term as is therein mentioned, at the yearly rent of —, lawful money aforesaid, payable quarterly, that is to say, — and also all my estate, right, title, interest, term of years, claim, and demand whatsoever, of, into, or out of the same messuage and other the premises, or any or either of them, or otherwise howsoever, together with the same indenture and agreement, and all the benefit thereof. To have and to hold the said messuage or tenement, buildings, garden, summer-house, mount, and other the premises hereby assigned or mentioned so to be, with the appurtenances, unto the said G. F., his executors, administrators, and assigns, from henceforth, for all the now residue of the within mentioned term of twenty-one years, and of such other term or terms as I, the said C. D., now have or ought to have therein respectively, subject, nevertheless, to the rents, covenants, and agreements in the said indenture and agreement respectively reserved, and contained, and agreed upon, and which from henceforth, on the tenant's or lessee's part, are or ought to be paid, done, and performed.

In witness whereof, &c.

NO. XXII.

An Assignment of a Lease, by Indenture indorsed thereon.

This indenture, made, &c., between H. H., of —, &c., of Parties the one part, and J. J., of —, &c., of the other part, witnesseth : That for and in consideration of the sum of — dollars of lawful money of the United States, to him, the said

assign, H. H., in hand paid by the said J. J., at or before the sealing and delivery of these presents, the receipt whereof the said H. H. doth hereby acknowledge, he, the said H. H. hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said J. J., his executors, administrators, and assigns, all that the within mentioned messuage or tenement, dwelling-house, and premises, together with the appurtenances thereunto belonging. And all the estate, right, title, interest, term, and terms of years yet to come and unexpired, use, trust, property, privilege, claim, and demand whatsoever, both at law and in equity of him, the said H. H., of, in, and to the same or any part thereof, together with the said indenture of lease. To have and to hold the said messuage or tenement, dwelling-house, and premises, and also the within indenture of lease, unto the said J. J., his executors, administrators, and assigns, from the — day of — now last past, for and during all the unexpired residue of the term of —, by the within indenture of lease granted, free and clear of, and from all arrears of rent rates, and taxes whatsoever, up to the said — day of — last. But subject, nevertheless, to the payment of the rent, and to the observance of all and singular the covenants, conditions, and agreements therein reserved and contained. And the said H. H. doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said J. J., his executors, administrators, and assigns, in manner following (that is to say), that he, the said H. H., shall and will well and truly pay, or cause to be paid, all the rent, taxes, charges, rates, and assessments due in respect of the said premises hereby assigned up to the — day of — last. And further, that he, the said H. H., hath not at any time heretofore made, done, committed, or executed, or willingly permitted or suffered any act, deed, matter, or thing whatsoever, whereby the said within indenture of lease, messuage, or tenement, dwelling-house, and premises hereby assigned, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or encumbered in title, charge, estate, or otherwise howsoever, and that for and notwithstanding any such act, deed, matter, or thing as aforesaid, the said within written indenture of lease is a good and effectual lease, valid in law; and that the rent and covenants therein and thereby reserved and contained, have been hitherto well and truly paid, kept, and per-

subject to the rents and covenants of the lease.

Assignor covenants that he will discharge all debts, &c., up to the time of the assignment, and that he has not encumbered the estate,

formed. And that for and notwithstanding any such act, deed, matter, or thing as aforesaid, he the said H. H., now hath in himself good right, full power and lawful and absolute authority to assign and assure the said premises hereinbefore mentioned, with the appurtenances, unto the said J. J., his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents. And also that he, the said J. J., his executors, administrators, and assigns, shall and may from time to time, and at all times hereafter during all the rest, residue, and remainder of the said term of —, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage or tenement, and dwelling-house and premises, with the appurtenances hereby assigned; and the rents, issues, and profits thereof, without the lawful let, suit, trouble, denial, eviction, or interruption of or by him, the said H. H., his heirs, executors, or administrators, or any other person or persons lawfully claiming or to claim from, by, under, or in trust for him, them, or either of them. And further, that he, the said H. H., his heirs, executors, administrators, and all and every person or persons lawfully claiming or to claim from, by, under, or in trust for him, them, any, or either of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges in the law of the said J. J., his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, and things, assignments, and assurances in the law whatsoever; for the further, better, and more perfect and absolute assigning, assuring, and confirming the said premises, with the appurtenances, unto the said J. J., his executors, administrators, or assigns, for all the rest, residue, and remainder of the said term, as he or they, or his or their counsel in the law, shall reasonably advise and require. And the said J. J., for himself, his executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said H. H., his heirs, executors, and administrators, in the manner following (that is to say), that he, the said J. J., his executors, administrators, and assigns, shall and will from time to time and at all times, from the — day of —, during the residue of the said term of — years, well and truly pay, or cause to be paid unto such person or persons as for the time being, shall be entitled to receive the same, the yearly rent by the said indenture of lease

and has
power to
assign.

For quiet
enjoyment
by assignee;

for further
assurance.

Assignee
covenants
to pay rent;

to perform
the cove-
nants in the
lease.

reserved and made payable, and which from thenceforth shall grow due. And also well and truly perform, fulfil, and keep all and singular the covenants, clauses, provisos, and agreements in the said lease contained, and which, by and on the lessee's or assignee's part and behalf, is or are to be paid, observed, and performed, from the said — of —. And also shall and will, from time to time and at all times, well and sufficiently save, defend, keep harmless and indemnified the said H. H., his executors, administrators, and assigns, from and against all costs, charges, damages, and expenses whatsoever, which they or any or either of them shall or may sustain, or become liable to, by reason or means of the said J. J., his executors, administrators, or assigns, not paying all or any part of the said rent from time to time to become due, for or in respect of the said premises hereby assigned, from and after the said — day of —, or by reason or means of their not observing and fulfilling all or any of the covenants, provisos, and agreements in the said within written indenture of lease, reserved and contained, which, by and on the part of the said J. J., his executors, administrators, and assigns, are to be observed, performed, fulfilled, and kept from thenceforth.

In witness whereof, &c.

NO. XXIII.

Assignment of the Wife's Term for Years by the Husband.

Parties.

Recites the
wife's title
to the term,

This indenture, made the — day of —, &c., between A. B., of —, and F. his wife (before her marriage F. T.), of the one part, and C. D., of —, of the other part. Whereas by an indenture, bearing date the — day of —, and made, or expressed to be made, between J. H., of the one part, and the said F. B. (then F. T.), of the other part; for the considerations therein mentioned, the said J. H. did demise and lease unto the said F. B., her executors, administrators, and assigns, all that messuage, &c., with the appurtenances; to hold the same unto the said F. B., her executors, administrators, and assigns, from the — day of — then last past, for and during the full end and term of ninety-nine years from thence next ensuing, and fully to be complete and ended, at, under,

and subject to the rent, covenants, and agreements therein reserved and contained on the part of the said F. B., her executors, administrators, and assigns, to be paid, observed, performed, and kept; and whereas the said A. B., with the privity and approbation of the said F. his wife, hath contracted and agreed with the said C. D. for the absolute sale to him, the said C. D., of the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of lease, for the residue now to come and unexpired of the said term of ninety-nine years, at or for the price or sum of —. Now this indenture witnesseth: That in pursuance of the said agreement, and for and in consideration of the sum of —, of lawful money of the United States, to the said A. B. in hand well and truly paid, by the said C. D., at or before the sealing and delivery of these presents (the receipt whereof he, the said A. B., doth hereby admit and acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns for ever, by these presents), and also for and in consideration of the sum of five dollars of like lawful money, to the said F. B. in hand well and truly paid by the said C. D., at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged); he, the said A. B., with the privity and approbation of the said F. his wife (testified by her being a party to and sealing and delivering these presents), and also the said F. B. have, and each of them have bargained, sold, assigned, transferred, and set over, and by these presents do and each of them doth bargain, &c., unto the said C. D., his executors, administrators, and assigns, the said messuage or tenement, and all and singular other the premises comprised in and demised by the said in part recited indenture, with their and every of their appurtenances, together with the said in part recited indenture, and the full benefit thereof. And all the estate, right, title, interest, term, and terms for years, property, possibility, claim, and demand whatsoever, both at law and in equity, of them, the said A. B., and F. his wife, or either of them, of, in, to, or out of the same premises, or any part thereof.

and the contract of sale.

The consideration.

The assignment.

Habendum.

To have and to hold the said messuage or tenement, and all and singular other the premises hereby assigned or expressed, and intended so to be, with their appurtenances, unto the said C. D., his executors, administrators, and assigns, for and during

Covenants
by the hus-
band, that
he and his
wife had
good right
to assign.

For quiet
enjoyment.

all the residue and remainder now to come and unexpired of the said term of ninety-nine years, subject, nevertheless, to the payment of the rent, and to the performance and observance of the covenants and agreements in the said in part recited indenture reserved and contained, and which, from henceforth, on the lessees' or assignees' part and behalf, are and ought to be paid, observed, and performed. And the said A. B., for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said C. D., his executors, administrators, and assigns, by these presents, in manner following (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him, the said A. B., or the said F. his wife, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, the hereinbefore in part recited indenture of lease, at the time of the sealing and delivery of these presents, is a good and effectual lease and demise in the law of the said premises therein comprised, and the said term of ninety-nine years is not forfeited, merged, extinguished, surrendered, determined, or otherwise become void or voidable. And that for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he, the said A. B., and the said F. his wife, or one of them, now have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority to assign the premises hereby assigned, or expressed or intended so to be, with the appurtenances thereunto belonging, unto the said C. D., his executors, administrators, and assigns, for all the residue now to come of the said term of ninety-nine years in manner aforesaid, according to the true intent and meaning of these presents. And that it shall and may be lawful to and for the said C. D., his executors, administrators, and assigns, from time to time and at all times hereafter, during the said term of ninety-nine years, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the premises hereby assigned, or expressed and intended so to be, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by him, the said A. B., and the said F. his wife, or either of them, their or either of their executors or administrators, or by any other person or persons lawfully or equitably claiming or to claim by, from, or

under or in trust for them, or any of them. And that free and clear, and for ever discharged or otherwise by the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all estates, titles, troubles, charges, debts, and encumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B., and F. his wife, or either of them, their or either of their executors or administrators, or by any person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them, or any of them. And further, that he, the said A. B., his executors and administrators, and all and every other persons or person having or claiming, or who shall or may have or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned, or expressed and intended so to be, or any of them, or any part thereof respectively, by, from, or under, or in trust for him, the said A. B., and F. his wife, or either of them, their or either of their executors, or administrators, shall and will from time to time, and at all times hereafter during the said term of ninety-nine years, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said C. D., his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring of the premises hereby assigned, or expressed and intended so to be, and every part thereof, with their appurtenances, unto the said C. D., his executors, administrators, and assigns, for the residue which shall be then to come of the said term of ninety-nine years, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably devised, or advised and required. And also that he, the said A. B., his executors, or administrators, shall and will pay the rent reserved by the aforesaid in part recited indenture of lease, up to and including — day now next ensuing, and shall and will keep indemnified the said C. D., his executors, administrators, and assigns, and his and their lands, tenements, goods, and chattels respectively, from the same rent, and from all costs and

For further
assurance.

And for pay-
ment of rent,
and perform-
ance of cove-
nants up to a
given time.

Covenants
by assignee
for payment
of rent, and
performance
of covenants
after that
time.

expenses on account of the non-payment thereof, or on account of the breach or non-performance of any of the covenants or agreements in the said in part recited indenture on the part of the said F. B., her executors, administrators, or assigns, to be performed from the commencement thereof. And the said C. D., doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said A. B., his executors, administrators, and assigns, that he, the said C. D., his executors, administrators, and assigns shall and will, at all times during the continuance of the said term of ninety-nine years, pay the yearly rent reserved by the aforesaid in part recited indenture of lease, from — day of — now next ensuing, and perform, fulfil, and keep all and every the covenants and agreements in the said indenture of lease contained, on the part of the tenant or lessee from henceforth to be performed, and from the same rent, covenants, and agreements, and all costs and expenses on account of any breach, neglect, or default of, or in payment or performance thereof as aforesaid, shall and will save harmless and keep indemnified the said A. B., and F. his wife, and each of them, their and each of their executors and administrators, and their lands, tenements, goods, and chattels respectively.

In witness, &c.

NO. XXIV.

Lease by Husband and Wife, under a Power of Leasing.

Parties.

Witnesseth,
that pursuant
to the
power,

This indenture, made, &c., between E. H., of —, and G. his wife, of the one part, and C. B., of —, of the other part, witnesseth: That pursuant to and in execution of a power to them, the said E. H., and G. his wife, for this purpose given or limited, in and by a certain indenture of release, bearing date the — day of —, made between the said E. H. of the first part, the said G. H. (then G. P., spinster), of the second part, and C. D. of the third part (being the settlement made previously to, and in contemplation of, the marriage then intended, and which was shortly afterwards duly had and solemnized between the said E. H., and G. now his wife), and of every or any other power or authority, in anywise enabling

them in this behalf, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, on the part and behalf of the said C. B., his executors, administrators, and assigns, to be paid, observed, and performed; they, the said E. H., and G. his wife, do, by this indenture, limit, appoint, and demise unto the said C. B., his executors, administrators, and assigns, all that, &c. (the parcels), together with all and singular houses, out-houses, tenements, hereditaments, and appurtenances whatsoever to the said messuage and premises belonging, or in anywise appertaining: To have and to hold all and singular the premises hereinbefore, limited appointed, and demised, or intended so to be, with the appurtenances, unto the said C. B., his executors, administrators, and assigns, for the term of twenty-one years, to be computed from the day of, &c., now last past, and thenceforth next ensuing, and fully to be complete and ended; yielding and paying yearly, and every year during the said term, unto the person or persons for the time being entitled to the said premises in reversion or remainder immediately expectant, on the said term of twenty-one years, the yearly rent or sum of \$800, lawful money of the United States of America, by equal quarterly payments, on the first days of March, June, September, and December, in every year, without any deduction or abatement whatsoever for or in respect of the land-tax, or any other present or future taxes, or any other matter or thing whatsoever; the first quarterly payment of the said yearly rent to be made on the first day of March next ensuing the day of the date of these presents; provided, always, nevertheless, and these presents are upon this express condition, that if the said yearly rent, or any part thereof, shall be in arrear after the same ought to be paid as aforesaid, or if the said C. B., his executors, administrators, or assigns, shall, at any time or times during the continuance of this demise, transfer, or assign over, or underlet, or agree to transfer, or assign over, or underlet to any person or persons whomsoever, the premises hereinbefore limited, appointed, or demised, or any part or parts thereof, for all or any part of the said term, without the license and consent, in writing, of the person or persons for the time being entitled as aforesaid, for that purpose first had and obtained; or if the said C. B., his executors, administrators, or assigns, shall become bankrupt, or shall compound his or their debts, or assign over his or their estate and effects for payment thereof, or if any

and in consideration of the rent and covenants,

limit, appoint and demise to the lessee the parcels.

Habendum.

For the term of twenty-one years,

at the yearly rent of 800 dollars

Proviso for re-entry,

on non-payment of rent.

or by lessee's assignment.

or becoming bankrupt, or compounding debts.

execution shall issue against him or them, or any of his or their effects whatsoever, whereupon the said premises, or any part thereof shall be taken or attempted to be taken in execution; or if the said C. B., his executors, administrators, or assigns shall not, from time to time and at all times during the continuance of this demise, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements which, on his and their part, are and ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents; then, and in any of the said cases, it shall and may be lawful to and for the person or persons for the time being entitled as aforesaid, into and upon the said appointed and demised premises, or any part thereof in the name of the whole, to enter, and the same to have, retain, possess, and enjoy, discharged from these presents, and the limitation, appointment, and demise intended to be hereby made as aforesaid, any thing herein contained to the contrary thereof in anywise notwithstanding.

or on breach
of any cov-
enants by
lessee.

Covenants
by lessee;

for payment
of rent;

and taxes;

to repair
the house;

And the said C. B. doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the person or persons for the time being entitled as aforesaid, in manner following, that is to say: that he, the said C. B., his executors, administrators, and assigns shall and will well and truly pay, or cause to be paid, unto the person or persons for the time being entitled as aforesaid, the aforesaid yearly rent of \$800, on such days or times as are hereinbefore mentioned and appointed for the payment thereof; and also shall and will well and truly pay, bear, and discharge the land-tax, and all other taxes, charges, duties, or assessments whatsoever, either already taxed, charged, assessed, or imposed, or at any time or times hereafter, during the continuance of this demise, to be taxed, charged, assessed, or imposed upon the said premises, or any part or parts thereof, or upon the person or persons for the time being entitled as aforesaid in respect thereof, as landlord or landlords of the same premises, by any competent authority whatsoever.

And also shall and will, at his and their own costs and charges, well and substantially uphold, repair, support, and maintain the said messuage or farm-house, and all the barns, stables, and out-buildings thereunto belonging, and all the glass windows, glazing, and lead-work of the same messuage or farm-house and premises; and all locks, keys, hinges, bolts, bars,

fixtures, pumps, and the running gears thereof; and all gates, stiles, pales, posts, bridges, hedges, ditches, drains, watercourses, and inward and outward fences of every kind, of or belonging to the said premises, or any part or parts thereof, at all times during the continuance of this demise, when need and occasion shall be or require, sufficient timber and fencing stuff being found by the person or persons for the time being entitled as aforesaid, within a reasonable distance from the place or places where the same shall be required to be used, such timber and fencing stuff to be cut and carried at the expense of the said C. B., his executors, administrators, or assigns; and the same messuage or farm-house, articles, things, and premises being so well and sufficiently upholden, repaired, supported, and maintained, shall and will peaceably and quietly leave, surrender, and yield up to the person or persons entitled to the said premises, at the end of or sooner determination of the said term, together with such fixtures, materials, and things as are now, or shall at any time or times during the continuance of this demise, be set up and affixed within, upon, or about the said premises hereinbefore limited, appointed, and demised, or any part or parts thereof (reasonable use or uses thereof, and accident by fire only excepted).

sufficient
allowances
of timber;

and leave
the same at
the end of
the term,
with fix-
tures;

And also that the said C. B., his executors, administrators, or assigns, or any of them, shall not nor will, at any time or times during the continuance of this demise, transfer, assign over, or underlet to any person or persons whomsoever the said premises hereinbefore demised, or any part or parts thereof, for all or any part of the said term of years, without the license or consent, in writing, of the person or persons for the time being entitled as aforesaid, for that purpose first had and obtained.

not to assign
or underlet;

And also that he, the said C. B., his executors, administrators, and assigns, shall not, nor will at any time or times during the continuance of this demise, plough, dig, break, or convert into tillage or garden ground any of the fields, closes, pieces or parcels of meadow, pasture, and marsh lands, hereinbefore limited, appointed, and demised, or any part thereof respectively.

plough up
any of the
field;

And also shall not, nor will during the continuance of this demise, mow, or cause or suffer to be mowed, the fields, closes, pieces or parcels of land hereinbefore demised, or any of them, or any part thereof respectively, more than once in a year during the three last years of this demise, nor permit or suffer the

mow the
lands oftener
than once a
year.

same, or any part thereof respectively, to be injured or damaged by heavy cattle during the continuance of this demise.

or take
more than
two succes-
sive crops.

And also shall and will so manage and cultivate the arable lands (parcel of the said premises hereinbefore limited, appointed, and demised), at all times during the continuance of this demise, that no more than two successive crops of corn or grain, and those two not of the same kind, shall be had or taken from off the same, or any part or parts thereof, without giving the same a clear summer fallow, or sowing the same with turnips in the ensuing year, and with the next crop after such turnips, laying down the same land in a husband-like manner, with a sufficient quantity of sound clover and other grass seeds, and continuing the same so laid down two years, to be computed from the midsummer day next after sowing the same seeds.

To in the
corn upon
the premises,

and use the
straw, &c.,
there,

with excep-
tions.

Landlord
and succeed-
ing tenant to
have an op-
tion to pur-
chase the
hay left at
a valuation.

And also shall and will yearly, and every year during the said term, inbarn or stock on the said premises all the corn or grain which shall grow or arise therefrom, and there thrash the same, and feed and fodder cattle, or otherwise spend or consume on the said premises all the straw, chaff, and clover arising therefrom, and also all the hay and turnips that shall grow or arise from or upon the said premises hereinbefore demised, except the winter straw that shall be wanted for thatching and daubing work; also except half the hay and clover which shall arise in the last year of this demise, and the whole of the straw and chaff arising from the corn in the said last year, which half of the hay, and the entirety of which straw and chaff, shall be left upon the said premises, for the benefit of the person or persons for the time being entitled as aforesaid, or his, her, or their succeeding tenant or tenants of the said premises; which hay, however, is to be so left upon the premises only for the purpose of giving an option to such person or persons, his, her, or their succeeding tenant or tenants, so becoming the purchaser or purchasers thereof, at so much money as the same shall be reasonably worth in the judgment of two judicious persons, one of them to be chosen by the said C. B., his executors, administrators, and assigns, and the other of them to be chosen by the person or persons taking the same; and in case such two persons so chosen shall disagree as to the amount of such valuation, then the same shall be referred to the valuation of a third judicious person, to be chosen by the two first chosen, and the valuation to be made shall be binding and conclusive upon all the said parties.

And also shall and will spend and lay, in a husband-like manner, where the same shall be most wanted, all and every the dung, manure, muck, and compost that shall arise and be made during the continuance of this demise, from the hay, straw, clover, and turnips that shall be so spent and consumed on the said premises as aforesaid, except the dung, manure, and compost that shall arise and be made therefrom in the last year of this demise, and during the time that shall elapse between the end of this demise and the first day of May then next ensuing, and shall and will turn in heaps and leave in the yard, or some other convenient part of the said premises hereinbefore limited, appointed, and demised, the dung, manure, muck, and compost so excepted as aforesaid, except such part thereof as shall be used for preparing turnips for the benefit of the person or persons for the time being entitled as aforesaid, or his or their succeeding tenant or tenants of the same premises, without any allowance being made to him or them, in respect of the same.

Also to spend the dung made during the term on the premises,

and so leave the same.

And also that he, the said C. B., his executors, administrators, or assigns shall and will yearly, and every year during the continuance of this demise, in a husband-like manner, cut, scour, or cause and procure to be cut and scoured — yards of the fences and ditches upon such part of the arable land hereinbefore limited, appointed, and demised; and — roods of the fences and ditches upon such part of the marsh lands as shall most require cutting and scouring; and do or cause to be done all such outhawking, danking, and planting necessary for that purpose, being allowed bushes, thorns, and other fencing, sufficient, to be taken from the premises.

Also to scour ditches and cut fences.

And the said E. H. doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said C. B., his executors, administrators, and assigns, that he, the said C. B., his executors, administrators, and assigns, paying the said yearly rent of \$800 hereinbefore reserved, as the same shall become due and payable, in the manner and form aforesaid, and well and truly observing, performing, fulfilling, and keeping all and singular the covenants and agreements hereinbefore contained, on his and their parts to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, shall or lawfully may, peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said messuage or farm-house, and

Covenant by husband with lessee for quiet enjoyment.

other premises hereinbefore limited, appointed, and demised, or expressed and intended so to be, with their appurtenances, during the said term of twenty-one years, without the lawful let, suit, trouble, or hindrance of or by the person or persons for the time being entitled as aforesaid, or any person or persons whomsoever lawfully obtaining or to claim by, from, under, or in trust for such person or persons, or any of them.

In witness, &c.

NO. XXV.

Agreement for Lodgings.

Memorandum of an agreement entered into this — day of —, 1804, by and between A. B., of, &c., and C. D., of, &c., whereby the said A. B. agrees to let, and the said C. D. agrees to take, the rooms or apartments following, that is to say: an entire first floor, and one room in the attic story or garrets, and a back-kitchen and cellar opposite, with the use of the yard for drying linen, or beating carpets or clothes, being part of a house and premises in which the said A. B. now resides, situate and being in —. To have and to hold the said rooms or apartments, and the use of the said yard as aforesaid, for and during the term of half a year, to commence from — next after the date hereof, at and for the yearly rent of — of lawful money of the United States, payable monthly, by even and equal portions, the first payment to be made on — next ensuing the date hereof; and it is further agreed that, at the expiration of the said term of half a year, the said C. D. may hold, occupy, and enjoy the said rooms and apartments, and have the use of the said yard as aforesaid, from month to month, for so long a time as the said C. D. and A. B. may and shall agree at the rent of — for each month, and that each party be at liberty to quit possession on giving to the other a month's notice in writing. And it is also further agreed between the said parties, that when the said C. D. shall quit the premises, he shall leave them in as good a condition and repair as they shall be in on his taking possession thereof, reasonable wear excepted.

As witness, &c.

NO. XXVI.

Agreement for Ready-Furnished Lodgings.

Memorandum of an agreement, entered into this — day of —, in the year of our Lord —, by and between A. B., of, &c., of the one part, and C. D. of, &c., of the other part, by which the said A. B. agrees to let to the said C. D. a room or apartment up one pair of stairs forward, in his, the said A. B.'s house, situate in — Street, in the — and county aforesaid, ready furnished; together with the use and attendance of his — servant, in common with the other lodgers. And also the use of a cellar, at the rent of — of lawful money of the United States per month. And the said C. D. agrees to take the said room or apartment, with the use of the servant and cellar as aforesaid, at the rent aforesaid, and also to find and provide for himself all manner of linen, and china or crockery ware whatsoever, that he shall have occasion for, and that if he shall break or damage any part of the furniture of the said A. B. he will make good or repair the same, or pay him sufficient to enable the said A. B. to put the same in the same plight and condition as they now are in. And it is further agreed, that if either party shall quit or leave the premises, he shall respectively give to or take a month's notice, in writing, to be computed from the date of the said notice.

As witness, &c.

NO. XXVII.

1. *Notice to quit by the Landlord to his Tenant from Year to Year.*

Please to take notice, that you are hereby required to surrender and deliver up possession of the house and lot known as number —, in — Street, in the city of New York, which you now hold of me, and to remove therefrom on the first day of May next, pursuant to the provisions of the statute relating to the rights and duties of landlord and tenant.

Dated this — day of —, 1864.

A. B., *Landlord.*

To Mr. C. D.,

Tenant in possession of the premises above specified.

2. *Notice to quit by the Tenant.*

Please to take notice, that on the first day of May next I shall quit possession, and remove from the premises I now occupy, known as house and lot number —, in — Street, in the city of New York.

Dated this — day of —, 1864.

Yours, &c.,

C. D.

To Mr. A. B.

3. *The Like, where the Commencement of the Tenancy is uncertain.*

Mr. C. D. :—

I hereby give you notice to quit and deliver up, on the — day of — next, the possession of the messuage or dwelling-house [or “rooms and apartments,” or “farm-lands and premises,”], with the appurtenances, which you now hold of me, situate in the — of —, in the county of —, provided your tenancy originally commenced at that time of the year; or otherwise, that you quit and deliver up the possession of the said messuage, &c., at the end of the current year of your tenancy, which shall expire next after the end of one half-year from the time of your being served with this notice.

Dated the — day of — 18—.

Yours, &c.,

A. B.

To Mr. C. D.

4. *Notice to the Tenant either to quit the Premises or pay Double Value.*

Sir :—

I hereby give you notice to quit and yield up, on the — day of — next, possession of the messuage, lands, tenements, and hereditaments, which you now hold of me, situate at —, in the parish of —, and county of —, in failure whereof I shall require and insist upon double the value of the said premises, according to the statute in such case made and provided.

Dated this — day of —.

Yours, &c.,

A. B.

To C. D.

5. *Notice to pay Rent, or surrender the Premises.*

Please to take notice that you are indebted to me in the sum of — dollars, for rent of the house and premises No. —

Street, in the city of —, now occupied by you ; and that I require the payment of said rent on or before the — day of — instant (*three days*), or the possession of said premises.

Dated this — day of —, 1864.

A, B., *Landlord*.

To Mr. C. D., *Tenant*.

6. *Affidavit of Service of Notice.*

State of New York, county of Kings, ss. A. B., of the city of —, being sworn, says that on the — day of —, 1865, he personally served a notice in writing, of which the annexed is a copy, upon C. D., of — in said county, by delivering the same to him in person (*or*) by delivering the same to R. D. the wife of the said C. D., (*or*) to W. D. the son of the said C. D., a person of eighteen years of age and upwards, residing upon the premises mentioned in the said notice, (*or*) by affixing the same upon the front door of the premises mentioned in the said notice, or *other conspicuous part of the premises*, there being no person to be found upon or residing upon the said premises at the time of such service.

A. B.

Sworn this — day of }
—, 1864, before me, }

NO. XXVIII.

Surrender of a Term of Years.

To all to whom these presents shall come, I, W. E., of —, send greeting.

Whereas, by indenture, &c. [*recite the lease*], now know ye that I, the said W. E., in consideration of —, to me in hand paid by A. B., &c. (the receipt, &c.), do hereby for me, my &c., surrender and yield up, from the day of the date hereof, unto the said A. B., his, &c., the said indenture of lease, and all the messuage and premises aforesaid, and the term of years therein yet to come, with all my right, title, and interest thereto, and which I have or claim, or hereafter can or may have or claim, either by virtue of said indenture, or otherwise howsoever ; and that free and clear, and freely and clearly, &c., [*against encumbrances*].

In witness, &c.

NO. XXIX.

Surrender of a Lease for Lives.

Parties. To all to whom these presents shall come, A. B., of —, and C. his wife (before her marriage, C. D., spinster), send greeting.

Recites the lease intended to be surrendered. Whereas W—— S——, of —, by an indenture of lease under seal, bearing date the — day of —, did grant, demise, and lease unto the said C. B. (then C. D., spinster) all that messuage, &c. (the parcels), to hold the same with the appurtenances, unto the said C. B., her heirs and assigns, from the — day of —, for and during the natural lives of E. F. and I. K. and the life of the survivor or longer liver of them, at and under the yearly rents, and subject to the covenants and agreements therein reserved and contained, and on the part of the tenant or lessee to be paid, observed, and performed. And whereas the said E. F. hath departed this life; and whereas the said A. B., and C. his wife, being desirous of obtaining a renewal of the aforesaid lease, in consequence of the death of S—— to grant a new lease of the said demised premises, and the said E. F., have applied to and requested the said W—— which the said W—— S—— has agreed to do upon having the said recited indenture of lease, and the premises hereby demised, surrendered, and given up in manner hereinafter mentioned; and whereas by an order of the Court of Chancery, bearing date the — day of —, and made on the petition of the said A. B., and C. now his wife, it is ordered (here recite the order); Now these presents witness, that in pursuance of the aforesaid agreement, and in obedience to the aforesaid order, and for and in consideration of the sum of ten dollars of lawful money of the United States to the said A. B., and C. his wife, paid by the said W—— S——, at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), they, the said A. B., and C. his wife, have and each of them hath surrendered and yielded up, and by this present deed do and each of them doth surrender and yield up unto the said W—— S—— the said messuage or tenement and premises hereinbefore described, and comprised in the aforesaid in part recited indenture of lease, with the appurtenances; and also the said recited indenture of lease. And all the estate, right, title, interest, claim, and demand whatsoever

The death of one of the lives, agreement, to renew,

and the order of the court directing the surrender.

Husband and wife surrender

the demised premises

and lease to the said W. B.,

ever of them, the said A. B., and C. his wife, or either of them, of, in, to, and out of the same premises, and every part thereof. To the end that all the subsisting estate and interest under the said indenture of lease, of and in the said demised premises, may merge and be extinguished in the inheritance of the same premises, and to the intent and in confidence the said W—— S—— shall and do grant a new lease of the same premises, pursuant to the aforesaid order.

to the intent
that a new
lease may be
granted.

In witness, &c.

Sealed and delivered }
in the presence of }

NO. XXX.

A Surrender for the purpose of a Merger, Indorsed.

To all to whom these presents shall come, the within-named A. B., executor of the last will and testament of B., his late wife deceased, which said B. was formerly the wife and afterwards the widow and sole executrix named in the last will and testament of the within-named C. C., and D. D., and E. his wife, send greeting.

Parties.

Whereas the said D. D., and E. his wife, have agreed to pay off and discharge the principal and interest due, and to grow due to the said A. B., as executor, as aforesaid, on the within written indenture, and the term of — years in the premises herein comprised is intended shortly to be assigned and transferred unto the said D. D., and E. his wife, or unto such person and persons, for such intents and purposes as he, the said D. D., and E. his wife, shall direct and appoint; but previous thereto the said D. D., and E. his wife, are desirous of having the within-mentioned premises, and the within-mentioned term of — years, assigned and surrendered to them, in order to merge the same in the freehold and inheritance of the same premises, and for that purpose have applied to the said A. B., who hath agreed to assign and surrender the same accordingly.

Recites the
lease to be
surrendered.

Now these presents witness, that, in pursuance of such agreement, and for and in consideration of the sum of five shillings, to the said A. B. in hand well and truly paid by the said D. D., and E. his wife (the receipt whereof is hereby acknowledged),

Surrender
the term,
that it may
merge.

he, the said A. B., hath granted, surrendered, and yielded up, and doth hereby, &c., unto the said D. D. and E. his wife, her heirs, and assigns, all, &c., and premises comprised in the within written indenture, and therein mentioned to be hereby assigned to the said A. B., with their appurtenances, and all the estate, interest, use, trust, property, claim, and demand whatsoever, either in law or in equity, of him, the said A. B., of, into, or out of the said hereditaments and premises, and to the said term of — years, to the intent that the said term of — years may be merged and extinguished in the freehold and inheritance of the hereditaments and premises hereby surrendered or mentioned, or intended so to be, and the remainder now to come and unexpired of such term of — years, of and in the premises assigned to the said A. B., may merge, and become determined and utterly extinguished in the reversion, fee-simple, and inheritance of the same premises. [*Add a covenant from A. B. that he hath not encumbered.*]

NO. XXXI.

A Surrender of a Term (Part of the Leased Premises having been destroyed by Fire), Indorsed on the Lease.

Whereas the within-mentioned messuage or tenement hath been lately burnt down and destroyed by fire, and the within-named A. hath requested the within-named B. and C. to surrender to him, the said A., the site or parcel of ground whereon the said messuage or tenement lately stood, for all the residue and remainder of the said term of — years, by the said within written indenture granted therein, now to come and unexpired, to the intent that the same residue may merge and be extinguished in the estate and interest of him, the said A., in the same premises respectively, which they, the said B. and C., have consented and agreed to do; now these presents witness, that in compliance with the said request of the said A., and also for and in consideration of five shillings, to the said B. and C. paid by the said A. (the receipt, &c.), they, the said B. and C. have surrendered and yielded up, and by these presents do, &c., unto the said A., his executors, administrators, and assigns, all that the said site, &c., and all the estate, &c.; to have

and to hold the said site, &c., and all and singular other the premises hereby surrendered and yielded up, or intended so to be, with their and every of their appurtenance, unto the said A., his executors, administrators, and assigns, from henceforth, for and during all the rest, residue, and remainder of the said term of — years, by the said within written indenture granted therein, now to come and unexpired, to the intent and purpose that the same residue may merge and be extinguished in the estate and interest of him, the said A., in the said premises respectively,

In witness, &c.

NO. XXXII.

SUMMARY PROCEEDINGS TO REMOVE A TENANT.

1. *Affidavit of Landlord to remove a Tenant holding over.*

State of New York, county of Kings, ss. A. B., of the city of Brooklyn, being sworn, says, that, on the — day of —, 1863, he let and rented to C. D. the house and lot known as No. —, — Street in said city, for the term of one year from the first day of May then next, and that said term has expired. And he further says, that the said C. D. (or E. F., the assignee or undertenant of the said C. D.) holds over, and continues in possession of the said premises, without the permission of this deponent, his landlord.

Sworn, &c.

A. B.

2. *Affidavit when made by an Agent.*

State of New York, &c., ss. G. H., of the city of Brooklyn, being sworn, says, he is the agent of A. B., the landlord of the premises hereinafter described, and is authorized to institute proceedings for the removal of C. D. therefrom. That, on the — day of —, he, as the agent of the said A. B., let and rented (&c., as in the former affidavit).

3. *Affidavit where there has been a Change of Ownership.*

State of New York, &c., ss. A. B. and C. D., both of the city of Brooklyn, being severally sworn, depose and say, and

each for himself saith, and, first, the said A. B. saith, that, on the — day of —, he let and rented (or, as the agent of L. M., the then owner of the premises let and rented) the house and lot known as No. —, — Street in said city, to G. H., for the term of one year from the first day of May then next, and that said term has now expired. And the said C. D. for himself saith that, on the — day of — (some day subsequent to the demise), the said L. M. sold and conveyed the said premises to this deponent (or that, at the time of the said letting, the said premises were subject to a mortgage, and that proceedings were subsequently taken to foreclose the said mortgage, and the premises were ordered, by the — Court of —, to be sold at auction by the sheriff of the county of Kings, who, on the — day of —, sold and conveyed the same to this deponent), and that the said G. H., the tenant, (and J. K., his assignee or undertenant), had due notice thereof, and that deponent is now the owner and landlord of the said premises; and he further saith, that the said G. H. (or J. K., his assignee or undertenant) holds over, and continues in possession of the said premises, after the expiration of his term, without the permission of this deponent, his landlord.

Sworn, &c.

A. B.

C. D.

4. *Affidavit in Case of Tenancy at Will.*

State of New York, &c., ss. A. B., of the city, &c., being sworn, says that, on or about the — day of —, 1864, he let and rented to C. D., during the will and pleasure of this deponent, the house and lot, &c., and that the said C. D. has held and occupied the said premises, as tenant at will to this deponent, from that period until the expiration of such tenancy, as hereinafter mentioned (or that since the — day of —, in the year —, C. D., of the same place, has held and occupied the house and lot in the — of —, on — Street, where the said C. D. now resides, as the tenant of this deponent, and at his will, and without any certain time agreed on for the termination of said tenancy). And he further says, that, on the — day of —, 1865, he caused to be served upon the said C. D., in due form of law, a notice in writing requiring the said C. D. to remove from the said premises, on or before the — day of —, 1865. That the time within which the said C. D.

was so required to remove has expired, but that he still holds over, and continues in possession of the said premises, after the expiration of such time, without the permission of this deponent.

Sworn, &c.

A. B.

5. *Affidavit in Case of Non-payment of Rent.*

State of New York, &c., ss. A. B., of the city, &c., being sworn, says that, on the — day of —, 1865, he let and rented to C. D. the house and lot known as No. —, — Street, in the said city, for the term of two years from the first day of May last past, at an annual rent of — dollars, payable quarterly on the usual quarter-days. That the said C. D. is now justly indebted to this deponent in the sum of — dollars for the quarter's rent of said premises, which fell due on the first day of — instant, pursuant to the terms of the agreement under which the said premises are held as aforesaid. That, on the day last mentioned, he, in due form of law, demanded the payment of the said quarter's rent of the said C. D. (or that he caused a notice in writing to be served upon the said C. D., in due form of law, on the — day of —, 1865, requiring the payment of the said rent to be made to this deponent on the — day of — instant (*three days' notice*), or the possession of the said premises), but that the said rent has not been paid, or any part thereof, and the said C. D. holds over, and continues in possession of the said premises, after default in the payment of such rent as aforesaid, and without the permission of this deponent.

Sworn, &c.¹

A. B.

6. *Justices' Summons.*

To C. D., of —, in the county of —, and any other person in the possession or claiming the possession of the premises hereinafter described.

Whereas, A. B., of —, has made oath in writing, and presented the same to me, That, &c. (*here set forth the facts contained in the affidavit*). Therefore you are hereby required forthwith to remove from the said premises, or show cause before me at my office, in the — in said city, on the — day

¹ Each of these affidavits, 4 and affidavit of the person who served 5, should be accompanied with the notice.

of — instant, at — o'clock, A.M., why possession of the said premises should not be delivered to the said landlord.

Witness my hand, this — day of —, 1865.

J. Q. A., *Justice*.

7. *Affidavit of the Service of the Summons.*

State of —, county of —, ss. A. B., of —, being sworn, says, that, on the — day of —, 1865, he personally served the within (or annexed) summons upon C. D., of —, therein named, by delivering a true copy thereof to him in person, and at the same time showing him the original summons (or by leaving a copy thereof at the place of residence of the said C. D., with R. D., the wife of the said C. D. (or with E. D., the daughter of the said C. D.), aged — years and upwards, residing on the said premises, and showing her the original summons, and that, at the time of such service, the said C. D. was absent from his said place of residence (or by affixing a true copy thereof upon the outside of the front door of the dwelling-house on the premises described in said summons, the said C. D. being then absent from his place of residence, and there being no person of mature age residing thereon).¹

Sworn, &c.

A. B.

8. *Warrant to put the Landlord in Possession.*

The People of the State of New York to the Sheriff of the county of Kings (or to any one of the constables of the town of —, or marshals of the city of —, in the county of —), greeting: —

Whereas A. B., of —, made oath in writing and presented the same to me (reciting the facts contained in the affidavits). Whereupon I issued a summons, requiring the said C. D., and any other person in the possession or claiming the possession of the premises above described, forthwith to remove from the said premises, or show cause before me, at my office in the —, on the — day of — instant, at — o'clock, A.M., why the possession of said premises should not be delivered to the landlord, and no sufficient cause having been shown to the contrary, and I, being satisfied by due proof of the service of the said summons, do therefore command you to remove all persons from

¹ For further particulars as to this affidavit, see § 722 and note.

the said premises, and to put the landlord, the said A. B., into the full possession thereof.

Witness my hand, this — day of —, 1865.

J. Q. A., Justice, &c.

Or, if there has been a trial, then, after the words, "should not be delivered to the landlord," add, instead of the concluding part of the above warrant, as follows: —

And whereas the said C. D., by his affidavit filed with me, denied the facts, or some of them, upon which the said summons was issued, and thereupon the issue so joined was tried by me; and, after hearing the evidence of the parties, I rendered a verdict in favor of the said A. B. (or before a jury duly nominated by me, and summoned for that purpose, who, after hearing the evidence of the parties, rendered a verdict in favor of the said A. B.), to wit that the possession of the said premises should be delivered to the said A. B., whereupon judgment was rendered by me in favor of said A. B., against the said C. D., in pursuance of such decision or verdict that the possession of the said premises should be delivered to the said A. B. Now therefore you are hereby commanded to remove all persons from the said premises, and to put the landlord, the said A. B., into the full possession thereof.

Witness my hand, this — day of —, 1865.

J. Q. A., Justice., &c.

9. Notice of Appeal from the Justices' Court.

IN JUSTICES' COURT.

A. B., Respondent, }
against
C. D., Appellant. }

SUMMARY PROCEEDINGS.

To A. B., above named, and to J. Q. A., Esq., Justice, ss.

Please to take notice, that I appeal to the County Court of the county of —, from the judgment rendered against me on the — day of —, 1865, before J. Q. A., Esq., in favor of the said A. B., under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases, in which judgment costs were included, amounting to — dollars, and that the grounds upon which said appeal is founded are as follows: — (*state all the grounds of the appeal fully.*)

Dated, &c.

Yours, &c.,

C. D.

NO. XXXIV.

IN FORCIBLE ENTRY AND DETAINER.

1. *The Complaint and Affidavit.*

To J. D., Esq., county Judge of Kings County : —

The complaint of A. B., of the city of Brooklyn, in the county of Kings, respectfully shows, That, on the — day of —, 1866, C. D., of said city, unlawfully made a forcible entry into and upon the lands and tenements of this complainant, situated in said city (or county), and particularly described as follows (here insert). That the said C. D. did then and there violently, forcibly, and with strong hand, eject and expel this complainant from the said premises (or, hold the complainant out of the possession of the said premises). That, at the time above specified, this complainant had and still has an estate of freehold (or for a term of years, &c.) in the said premises, and that the said C. D. still unlawfully and forcibly holds and detains the same from this complainant.

Dated the — day of —, 1866.

A. B.

County of Kings, ss. A. B., of said county, being sworn, says the foregoing complaint, by him subscribed, is true of his own knowledge.

Sworn this — day, &c.

A. B.

2. *Precept for a Jury.*

The People of the State of New York to the Sheriff, or to any Constable of the county of —, greeting: You are hereby required to cause to come before me, at my office in —, &c., on the — day of — instant, at — o'clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law to serve as jurors, to inquire, upon their oaths, for the said people, of a certain forcible entry, made by C. D., as is said, into the lands and tenements of A. B., in the city of —, in said county (or of a certain forcible holding out of possession of A. B. by C. D. of the lands and tenements of the said A. B., in the

city, &c.), against the form of the statute in such case made and provided.

Given under my hand this — day of —, 1866.

J. D.,
County Judge of Kings County.

3. Notice to the Defendant.

To C. D., of —, in the county of — :

You are hereby notified that A. B., of the city of —, in the county of —, has presented to me his complaint, accompanied by an affidavit duly verifying the same, stating that you did, on, &c. (*here state the substance of the complaint*), and that I have this day issued my precept, directed to the sheriff or to any constable of the said county, requiring him to cause to come before me, at my office, &c., on the — day, &c., at — o'clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law, to serve as jurors, to inquire, upon their oaths, of the forcible entry (*or forcible holding out*), as aforesaid.

Dated this — day of —, 1866.

J. D.,
County Judge of Kings County.

4. Affidavit of Service of the Notice.

County of Kings, ss. H. D., of the city of Brooklyn, being sworn says, That, on the — day of —, 1866, he personally served a notice in writing, of which the annexed is a copy, upon C. D., of —, in the county of Kings, by delivering the same to him in person (*or by delivering the same to A. D., the wife of the said C. D., on the premises described in the said notice, and that such service could not be made upon the said C. D., for the reason that, after diligent inquiry made by me, he could not be found, or by affixing the same on the front door of the house upon the premises described in said notice, there being no person of proper age on the premises ; and that such service could not be made upon the said C. D., for the reason that, after diligent inquiry made by me, he could not be found*).

Sworn this — day, &c.

H. D.

5. *The Inquisition.*

An inquisition taken before J. D., county Judge of Kings county, at his office in, &c., on, &c., by the oaths of B. D., &c. (*insert the names of the jurors who concur*). The undersigned, inhabitants of the county of Kings, duly qualified to serve as jurors, having been summoned to inquire of the forcible entry (or holding out) hereinafter mentioned, and having appeared, at the time and place aforesaid, before the said county Judge, and having been by him duly sworn to inquire into the said forcible entry (or holding out) complained of by A. B. against C. D., and to make a true inquisition thereof, and having then and there proceeded to make inquiry, and examine witnesses on oath, then and there administered by the said county Judge, do now here make this their inquisition as follows, to wit : —

The undersigned jury have found, and do hereby find and present, That A. B., of — aforesaid, long since had an estate of freehold (or for a term of years, &c., *as the fact may be*) in that certain piece of land situate in the city of — in the said county, described as follows *insert as in the complaint*), and that he was long since peaceably and lawfully possessed of the same, and that such estate and possession of the said A. B. so subsisted and continued until C. D. of — on the — day of —, 1866, at — aforesaid, did forcibly and unlawfully, and with strong hand, enter into the said land and premises, and eject and expel him, the said A. B., therefrom ; and the said A. B., so expelled from the said land and premises from the day last aforesaid until the day of taking this inquisition, unlawfully and forcibly and with strong hand did keep out, and does yet keep out, to the great disturbance of the people of the State of —, and contrary to the form of the statute in such case made and provided, and that the estate of the said A. B., as aforesaid, still subsists therein.

And the jurors aforesaid do, on the evidence produced before them, find the inquisition aforesaid to be true.

(*Signatures of jurors.*)

If the jurors should find that the entry was made in a peaceable manner, and that, after such entry, the possession was held by force, the inquisition will be varied, so as to state the forcible holding-out, instead of the forcible entry.

6. *Award of Restitution after Inquisition.*

The People of the State of New York, }
 on the relation of A. B., }
 against }
 C. D. }

The jury summoned and sworn to inquire into the forcible entry (*or* forcible detainer) complained of by A. B. against C. D., having made their inquisition, by which the said C. D. is found guilty of the said forcible entry (*or* detainer), and the defendant not having traversed the said inquisition within the time allowed by law, I, J. D., county Judge of the county of Kings, before whom the said proceeding is pending, do hereby award restitution to the said A. B. of the premises described in the said inquisition, and assess the costs and expenses¹ of the said proceedings at the sum of — dollars.

J. D.,
County Judge.

7. *Writ of Restitution.*

The People of the State of New York to the Sheriff, or to any constable of the county of Kings, greeting: Whereas A. B., of —, in said county, did, on the — day of —, 1866, make complaint to me in writing, duly verified, that C. D., on — day of —, &c., did (*here recite the substance of the complaint, and state the subsequent proceedings*). Now this is to command you to go to the premises aforesaid and cause the said C. D. to be restored and put into full possession of the said lands and premises; and you are also to levy and collect the sum of — dollars of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from levy and sale on execution), and to bring the money before me within sixty days from the receipt of this precept by you, to render to the said A. B. for his costs and charges herein —

Given under my hand this — day of —, 1866.

J. D.,
County Judge of Kings County.

¹ The costs and expenses are the fees of the officers who are required to perform the services. 6 How. Pr. R. 178; 4 Hill, R. 541,

8. *The Traverse of Inquisition.*

The People, &c.,
 on the relation of A. B.,
 against
 C. D. }

And afterwards, to wit, on the — day of —, at the city of —, in the county of —, before J. D., county Judge of the said county, comes the said C. D. in his proper person, and having heard the said inquisition read to him, hereby traversing the same, denies that he is guilty of the said supposed forcible entry (*or holding out*), in manner and form as in the said inquisition alleged, and of this he put himself upon the country, and the said people do the like (*or after, "traversing the same," proceed thus*), alleges that he or his ancestors, or those whose estate he has in the lands described in the said inquisition, have been in quiet possession thereof for the space of three whole years next before the said inquisition found, and that his interest therein is not yet ended or determined, and of this he puts himself on the country, and the said people do the like, &c.).

C. D.

9. *Precept for the Jury to try the Traverse.*

The People, &c., to the Sheriff or any Constable, &c., greeting: You are hereby commanded to summon twelve good and lawful men of the town of —, in said county, duly qualified to serve as jurors in courts of record, and not of kin to either A. B. or C. D., both of —, in the county of —, to come before the undersigned county Judge of — county, at his office in —, on the — day of — instant, at — o'clock, A. M., of that day, to make a jury of the county, to try, upon their oaths, a certain traverse of an inquisition found, upon the the complaint of the said A. B., against the said C. D., and now pending before me, for a certain forcible entry (*or holding out*) made by the said C. D., into the lands and premises of the said A. B., against the form of the statute in such case made and provided; and that you make a list of the persons summoned, and certify and annex the same to this precept, and make return hereof to me without delay.

Given under my hand this — day of —, 1866.

J. D., *County Judge.*

10. *Award of Restitution after a Verdict.*

Title of the proceeding as before — : The jury summoned to try and determine the forcible entry (*or* detainer), complained of by A. B. against C. D., upon the traverse of an inquisition found against the said C. D., having rendered their verdict, by which it appears that the said C. D. is found guilty of the said forcible entry (*or* detainer), I, the undersigned county Judge of the county of —, before whom the said proceeding is pending, do hereby award restitution to the said A. B. of the premises described in the complaint, and do assess the costs and expenses of the proceedings at — dollars.

Dated, &c.

J. D.,

County Judge, &c.

11. *The Writ of Restitution.*

(*Is the same as before, reciting all the proceedings.*)

12. *A Certiorari to remove the Proceedings.*

The People of the State of New York to J. D., County Judge of the county of —, greeting: Whereas we have understood on the complaint of C. D., that lately before you a certain inquisition was found against him for (*state the finding of the jury*). And we, being willing that the said inquisition, and all other proceedings concerning the same which remain before you, should be certified, and returned by you into our Supreme Court of Judicature, before our Justices thereof, do command you that you certify and return the same to the justices of our said court, with all proceedings appertaining thereunto, at the next term of the said court to be held at — on — next; so that our said justices may further act thereupon, as of right and according to law should be done; and have you then there this writ.

Witness J. W. G., Esq., Justice of the Supreme Court, at —, the — day of —.

J. W.,

C. & S. Candit, *Attorneys.*

Clerk.

(*Indorsed.*) On the application of C. & S. Candit, attorneys for C. D., and upon his affidavit, I allow the within writ of *certiorari* to issue.

J. W. G.,

Justice of the Supreme Court.

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[THE REFERENCES ARE TO THE PARAGRAPHS.]

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
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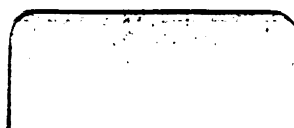
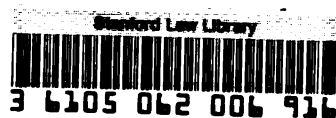
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